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No. 93-

In The
Supreme Court of the United States
October Term, 1993

LEVALD, INC., a Wisconsin Corporation, Trustee of Indian Springs Trust,

Petitioner,

vs.

CITY OF PALM DESERT, a California Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JERROLD A. FADEM
ANDREW H. KOPKIN
Counsel of Record
FADEM & DOUGLAS
A Professional Corporation
12424 Wilshire Boulevard, Suite 900
Post Office Box 250050
Los Angeles, California 90025
(310) 207-2727

Attorneys for Petitioner

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QUESTION PRESENTED

This Court's guidance is urgently needed, as this case presents a question of widespread constitutional importance, as well as a question of federal law, that merits determination by the Court.

Inverse condemnation actions have spawned a morass of confusing Federal and State Court decisions. The confusion is most acute in analyzing the nexus between ripeness and limitations issues. This mobile home rent control taking case presents a paradigm of this confusion. Here, the Ninth Circuit made the contradictory holding that petitioner Levald, Inc.'s claim was statute of limitations time-barred before the claim was ripe.

This petition seeks determination of whether when an ordinance is subject to facial challenge, the claim for relief accrues and the statute of limitations begins to run upon ordinance enactment — before damage occurs that warrants bringing suit.

PARTIES TO THE PROCEEDING

The parties to the proceeding are identified on the caption page.

The petitioner is Levald, Inc., a Wisconsin Corporation, Trustee of The Indian Springs Trust (Levald).

The respondent is the City of Palm Desert, a California Municipal Corporation (City).

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CITY OF PALM DESERT, a California Municipal Corporation,

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PETITION FOR WRIT OF CERTIORARI

Levald respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On September 9, 1991, the United States District Court for the Central District of California granted the City's Motion to Dismiss Levald's Complaint. (App C) On July 8, 1993, the Ninth Circuit affirmed the District Court's decision. (*Levald, Inc. v. City of Palm Desert* [9th Cir 1993] 998 F 2d 680) (App A) On September 3, 1993, the Ninth Circuit denied Levald's Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc. (App B)

JURISDICTION

On September 3, 1993, the Ninth Circuit denied rehearing (App B) of the Ninth Circuit's July 8, 1993 published decision (App A), which is now final.

This Court has jurisdiction to review the decision by writ of certiorari under 28 USC §1254(1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, 5th Amendment provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

United States Constitution, 14th Amendment provides, in relevant part: "No State shall . . . deprive any person of . . . property, without due process of law . . . ."

42 USC §1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The California Code of Civil Procedure §340 personal injury statute of limitations provides, in relevant part: "Within one year: * * * (3) . . . An action for . . . injury . . . caused by the wrongful act or neglect of another . . . ." [1]

The California Mobile Home Residency Law, California Civil Code, §798 et seq. provides, in relevant part: "§798.55(b) The management shall not terminate or refuse to renew a tenancy . . . ."

"§798.73 The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement."

Ordinance No. 456, The Mobile Home Park Rent Review Ordinance Of The City Of Palm Desert, enacted March 27, 1986, is reproduced as Appendix D.

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1 State personal injury statutes of limitations have been adopted by this Court as the statutes of limitations for civil rights actions. (Infra, P 15)

STATEMENT OF THE CASE

Levald owns the Indian Springs 191-unit mobile home park (Park) in the City.[2]

California mobile home parks are regulated by the California Mobile Home Residency Law, California Civil Code §798 et seq. (Residency Law).

Under the Residency Law, Levald cannot choose or evict tenants.[3] Thus, mobile home owners become perpetual Park tenants. Park tenants can sell their mobile homes, on the homes' existing sites, as they choose to whomever they choose, without Levald's consent.

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2 There are more than 500 mobile home parks in Southern California. Today's "mobile" homes are manufactured homes that are towed into place on a pad (level land area), connected to utilities, then fitted with porches, car ports, and other amenities. Their size and comforts compare favorably with tract homes. Mobile home residents own their homes and rent the pad from the mobile home park owner, who provides private streets, common areas, and recreational amenities.

3 California Civil Code §798.73 forbids mobile home park owners from requiring removal of mobile homes upon sale of mobile homes to third parties.

California Civil Code §798.55 forbids eviction of mobile home tenants.

On March 27, 1986, the City enacted Ordinance No. 456, The Mobile Home Park Rent Review Ordinance of The City of Palm Desert (Ordinance). (App D) The Ordinance prohibits mobile home park owners from increasing rent for a mobile home space when that space becomes vacant or the ownership of a mobile home is transferred.

Since the Ordinance's 1986 enactment, the City, once a sleepy desert community, has blossomed into the California desert's premier resort. The Park, which is in the City's most prestigious, high value area, more resembles a luxury resort than a conventional image of a trailer park.[4]

Today, land values in the Park's vicinity are 10 times values in 1983, when the City first enacted rent

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4 There are 7 mobile homes per acre in the Park. Each Park mobile home has over 2,500 square feet of land, fronts a lush, 5-acre greenbelt, has use of a club house, an Olympic-sized pool, and a spa, and enjoys panoramic views of the desert mountains and Coachella Valley.

control. The rent Levald now receives is a fraction of the current fair market rent for spaces in the Park.[5]

Together, the Residency Law and the Ordinance take Levald's property without just compensation, as they transfer a perpetual, inheritable possessory interest from Levald to its tenants: The mobile home owner becomes the permanent owner of the right to rent a space below fair market value as well as of his mobile home.

On August 23, 1989, Levald filed its Complaint. Levald alleged, *inter alia*, that together, the Residency Law and the Ordinance took Levald's property without just compensation, a civil rights violation.

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5 Unless permitted by the City's Rent Review Board, a mobile home park owner may only increase rent annually, by adding 3/4 of the increase in the Consumer Price Index (CPI). Levald has received the automatic CPI adjustment — most recently, a 1.17% annual rent increase, which has pushed Levald's rent return ever increasingly lower than current market values. Moreover, to obtain any "hardship" increase, Levald must show that *current* earnings are less than *1982* earnings, as adjusted by 1/2 of the CPI increase. This calculation does not include all expenses. Indeed, Levald had to sue to obtain even the restricted hardship increase in 1987.

On March 4, 1991, the City for the third time[6] moved to dismiss the Complaint. The first two City dismissal attempts were denied.[7]

On September 9, 1991, failing to recognize that Levald had pled a *regulatory* taking, the District Court held that Levald's "*physical* taking claims are barred by the [1-year civil rights] statute of limitations, and, therefore must be dismissed." (App C, P 20; emphasis added.)[8] On September 12, 1991, judgment was entered on the District Court's dismissal order.[9]

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6 Appendix C contains a detailed procedural history.

7 The third District Court judge dismissed what the first two judges would not.

8 This Court has repudiated the physical taking analysis for mobile home rent control taking cases. Thus, statute of limitations cases for physical takings are not controlling in the regulatory taking arena. (Infra, P 14)

9 The District Court had jurisdiction under 28 USC §1343 for civil rights violations, including violations of 42 USC §1983. The District Court also had jurisdiction under 28 USC §1331 because this action arises under the 5th and 14th Amendments to the United States Constitution and under the laws of the United States, including 42 USC §1983.

On October 9, 1991, Levald timely filed its Notice of Appeal from the District Court's dismissal.

On July 8, 1993, the Ninth Circuit affirmed the District Court's dismissal. On September 3, 1993, the Ninth Circuit denied Levald's Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc.

This timely Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

Levald's inverse condemnation action claims that on its face, the Ordinance effects a regulatory taking of Levald's property by transferring from Levald to Levald's tenants a discrete interest in land — the right to occupy Levald's land in perpetuity at a sub-market rent.

As this Court has taught but the Ninth Circuit has ignored, until Levald knew there was sufficient damage from enforcement of the Ordinance to warrant bringing suit to enforce Levald's claim:

- the claim for relief did not exist; and
- the statute of limitations did not begin to run.

Under this Court's holding, Levald's regulatory taking claim for facial invalidity of the Ordinance is timely.

LEVALD'S REGULATORY TAKING CLAIM IS TIMELY

Levald's regulatory taking claim for facial invalidity of the Ordinance is timely.

Until Levald knew there was sufficient damage from enforcement of the Ordinance to warrant bringing suit to enforce Levald's claim:

- Levald's claim for relief did exist; and
- the statute of limitations did not begin to run.

In holding that "the cause of action accrues and the limitations period begins to run upon the enactment of the [Ordinance]" (App A, P 17, *Levald*, 998 F 2d at 687), the Ninth Circuit doubly erred.[10] Further, seemingly unaware of the incongruity of its

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10 The Ninth Circuit failed to apply the federal law that governs the time of accrual of Levald's claim and the California law that this Court has affirmed governs the application of the statute of limitations. Although the claim accrued and the statute of limitations began to run when Levald knew there was sufficient damage resulting from enforcement of the Ordinance to warrant bringing suit to enforce Levald's claim, the Ninth Circuit wrongly held that the accrual of the claim began and the statute of limitations began to run as of the date of Ordinance enactment.

holding, the Ninth Circuit illogically held Levald's claim to be statute of limitations-barred before it was ripe.[11]

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11 "Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them 'ripe' for federal adjudication.

* * *

"[*Williamson County Regional Planning Comm'n v.*] *Hamilton Bank* [(1985) 473 US 172] did not address the issue whether the ripeness hurdle, which stands in the way of as-applied challenges, also obstructs their facial counterparts. Indeed, some courts have found that it does not. [Citations.] Moreover, the Supreme Court often has reached the merits of facial attacks without regard for ripeness considerations. [Citations.] In light of the ample confusion in this area, we . . . discuss the relevance of *Hamilton Bank's* ripeness requirements to facial takings challenges. We conclude that a claim alleging that mere enactment of a statute effects an unconstitutional taking is unripe unless and until it is known what, if any, compensation is available." (*Southern Pacific Transportation Co. v. City of Los Angeles* [9th Cir 1990] 922 F 2d 498, 502, 505-506; cert denied 116 L Ed 2d 333)

Until Levald had suffered damage due to enforcement of the Ordinance sufficient to warrant bringing suit and obtain compensation, Levald's regulatory claim was not ripe for federal adjudication.

The Applicable Law

Accrual Of The Claim For Relief

Federal law controls accrual of Levald's claim for relief because Levald claims a 42 USC §1983 civil rights violation and a taking under the 5th Amendment:

> "Federal law . . . determines when a cause of action accrues. [Citation.] 'Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action.' " (*Compton v. Ide* [9th Cir 1984] 732 F 2d 1429, 1432)

> "Courts have held consistently that a cause of action does not accrue until a party has a right to enforce the claim." (*Norco Construction, Inc. v. King County* [9th Cir 1986] 801 F 2d 1143, 1146)

Thus, a regulatory taking claim for relief did not accrue until Levald had sustained enough damage to justify filing suit. This principle is confirmed by this Court's holdings in *Hodel v. Virginia Surface Mining and Reclamation Association* (1981) 452 US 264, 293-297; *Hodel v. Indiana* (1981) 452 US 314, 335-

336; and *Pennell v. City of San Jose* (1988) 485 US 1 (Infra, P 18) [12]

De Anza Is Not Applicable

The Ninth Circuit said that holding Levald's claim to be untimely was "consistent" with its decision in *De Anza Properties X, Ltd. v. County of Santa Cruz* (9th Cir 1991) 936 F 2d 1084, 1087. (App A, P 17, 998 F 2d at 687)

However, *De Anza* was wrongly decided, as it:

- ignored this Court's teaching that mere *enactment* of an ordinance does not give rise to a cause of action; and

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12 In *Lucas v. South Carolina Coastal Council* (1992) 505 US __, 112 S Ct 2886, 120 L Ed 2d 798, 813, fn 6, the Court stated: "The cases say, repeatedly and unmistakably, that ' " [t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it 'denies an owner economically viable use of his land.'*"' [Citations.]" (*Lucas*, 120 L Ed 2d at 813, fn 6; emphasis in original.)

An owner cannot be denied "economically viable use of his land" until he has sustained damage. (See *Britt v. Superior Court* [1978] 20 C 3d 844, 860, fn 4; *Smart v. City of Los Angeles* [1980] 112 C App 3d 232, 238; infra, P 16-17.)

- does not apply to *regulatory* takings. *De Anza* analyzed a *physical* taking (936 F 2d at 1085, 1087), pursuant to *Hall v. City of Santa Barbara* (9th Cir 1986) 833 F 2d 1270, cert denied 485 US 940.

This Court *de facto* overruled *De Anza* when the Court overruled *Hall's* physical taking analysis for rent control ordinances. (*Yee v. City of Escondido* [1992] 503 US ___, 112 S Ct 1522, 118 L Ed 2d 153, 168)[13] [14]

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13 "*Yee* . . implicitly overruled *De Anza*, which was premised upon the physical taking theory of *Hall*. . . . *De Anza* is simply no longer good law for determining when a cause of action accrues for a takings claim." (*Azul-Pacifico, Inc. v. City of Los Angeles* [9th Cir 1992] 973 F 2d 704, 705, granting petition for rehearing and withdrawing the opinion reported at 948 F 2d 575; Kozinski J., concurring and dissenting.)

14 *Yee* left open the question whether the Residency Law, combined with a rent control ordinance, can be a regulatory taking. This Court stated that a compensable regulatory taking occurs if "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest[s] that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee*, 118 L Ed 2d at 162) Having analyzed the Yees' contentions as to the effects of the Residency Law "on the unusual economic relationship between park owners and mobile home owners" (*Yee*, 118 L Ed 2d at 164), this Court stated: "[P]etitioners conclude,

(footnote continued on next page)

Running Of The Statute Of Limitations

In *Wilson v. Garcia* (1985) 471 US 261, 275-276, this Court held that federal courts are to apply state personal injury statutes of limitation for *all* 42 USC §1983 claims:[15]

> "The characterization of §1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law. . . . Only *the length of the limitations period, and closely*

(*footnote continued from previous page*)
the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner." (*Yee*, 118 L Ed 2d at 165) The *Yee* analysis aptly describes Levald's case.

15 Persuasively dissenting in *Wilson*, Justice Sandra Day O'Connor noted:

"Despite vocal criticism of the 'confusion' created by individualized statutes of limitation, *most Federal Courts of Appeal and state courts have continued the settled practice of seeking appropriate factual analogies for each genus of § 1983 claim.* [Citations.] As these courts have recognized: 'The variety of possible claims that might be brought under section 1983 is unlimited . . . . *To impose one statute of limitations for actions so diverse would be to disregard the unanimous judgments of the states that periods of limitations should vary with the subject matter of the claim.*' " (*Wilson*, 471 US at 282-283; emphasis added.)

> *related* questions of tolling and *application*, are to be *governed by state law*." (*Wilson*, 471 US at 268-269; emphasis added.)

In California, the limitation period for personal injury is one year, pursuant to California Code of Civil Procedure §340(3).

In *Wilson*, this Court affirmed that the application of the limitations period, as well as its length, is "governed by state law." The California Supreme Court mandates a "liberal" approach for applying the statute of limitations in inverse condemnation suits:[16]

> "[T]he designation of a date upon which the statute of limitations begins to run in . . . inverse condemnation suits is difficult since typically no single date can be fixed upon which a constitutional 'taking' or 'damaging' has clearly occurred. [Citations.] Because the landowner bears the burden of determining when a gradually increasing in-

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16 In *Smart*, 112 C App 3d at 238, the 2nd District California Court of Appeal, citing this Court in *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174-175, affirmed: "[T]he rule in inverse condemnation [is] that each such action must be examined on its own to determine what result '. . . justice and fairness . . .' require."

> convenience has finally caused sufficient damage to be actionable, *courts have been liberal in fixing a date upon which the statute of limitations begins to run* [citations] and have indicated that a great variety of factors may be considered. . . ." (*Britt*, 20 C 3d at 860, fn 4; emphasis added.)

Thus, until Levald determined that the Ordinance "ha[d] finally caused sufficient damage to be actionable," the statute of limitations had not begun to run.

Damage From Enforcement Of The Ordinance Begins Accrual Of The Claim For Relief And The Running Of The Statute Of Limitations

Damage resulting from enforcement of the Ordinance begins both the accrual of the claim for relief and the running of the statute of limitations.

In 1986, at Ordinance enactment, disparity between actual rent and fair market rent was non-existent or slight. Controlled rent in 1986 was not substantially different from the fair market rent for Levald's mobile home park spaces. Only 2 sales took place in 1986, and no sales in 1987. Thus, enactment of the Ordinance caused no discernable damage. In 1988, Levald was first damaged when a market for rent-controlled mobile homes and the premium for the taken interest came into being.

There were 12 sales in 1988. Those 12 sales were a market from which Levald could learn it was damaged. The damage resulting from *enforcement* of an ordinance creates a cause of action. (*Hodel v. Virginia*, 452 US 264, 293-297; *Hodel v. Indiana*, 452 US 314, 335-336; *Pennell*, 485 US 1) (Supra, P 12-13)

In *Pennell*, property owners alleged that an ordinance was an invalid, unconstitutional taking. But this Court held that the action was premature because there was not yet damage:

> "In Virginia Surface . . . we found that a challenge to the Surface Mining Control and Reclamation Act of 1977, . . . was 'premature,' . . . and 'not ripe for judicial resolution,' . . . because the property owners . . . had not identified any property that had allegedly been taken . . . . Similarly, in this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim . . . ." (*Pennell*, 485 US at 10)

This Court then footnoted the settled law:

> "For this reason we also decline to address appellants' contention that application of [the section] to reduce an otherwise reasonable rent increase on the basis of tenant hardship violates the Fourteenth Amendment's due process and equal protection requirements. See Hodel v Indiana . . . (dismissing as *'premature'* a due process challenge to the civil penalty provision of the Surface Mining Act *because* 'appellees have made *no showing* that they were ever assessed civil penalties under the Act, much less that the statutory prepayment requirement was ever applied to them or *caused them any injury'*)." (*Pennell*, 485 US at 11, fn 5; emphasis added.)

Time is required for a market to develop. An established market value with a premium for rent-controlled mobile homes did not exist upon the 1986 Ordinance enactment. For a market to develop, it took until 1988, when there were 12 home sales in the Park. Only *two* sales took place between Ordinance adoption and 1988. Two sales are an insufficient number to create a discernible market.

Levald did not suffer damage that created a taking claim until the disparity between actual rent and

market rent recognizably grew to a substantial amount. (*U.S. v. Dickinson* [1947] 331 US 745, 749)

If Levald had challenged the Ordinance in 1986, before existence of a market with a premium for rent-controlled mobile homes, the challenge would have been premature for lack of damage.

When in 1988 the Ordinance first discernably caused a substantial shortfall in rental rates as compared to market rates and caused Levald damage, Levald promptly sued.

Importantly, Levald's injury is not analogous to the simple "single event" of an unlawful arrest, assault, and battery, and other analogies considered in *Wilson's* application of the personal injury statute of limitations. Levald is injured each time a mobile home is sold.[17]

Mobile homes in a given mobile home park are sold irregularly and unpredictably. Change in market rents is incremental, irregular, and unpredictable. Thus, Levald's injury is analogous to the intermittent, continuous, yet infrequent damage in *Dickinson*.

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17 The Ninth Circuit revealed its failure to understand Levald's case in holding that "[t]his is a single harm, measurable and compensable when the statute is passed." (App A, P 19, 998 F 2d at 688)

In *Dickinson*, the Court held:

> "We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. . . . [There] is not a good enough reason why he must sue then or have, *from that moment*, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him — for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim — the overflow due to rises in the level of the river — is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would . . . postpone bringing a suit . . . until the consequences . . . have so manifested themselves that a final account may be struck.
>
> "When dealing with a problem which arises under such diverse circumstances

> *procedural rigidities* should be avoided." (*Dickinson*, 331 US at 749; emphasis added.)

Constitutional rights should not be denied because of the procedural rigidity of suing within one year from when the Ordinance was enacted.[18]

The statute of limitations could not begin running before a market for rent-controlled mobile homes and the premium for the taken interest came into being in 1988, when 12 homes sold at prices showing there was damage.

It defies this Court's teaching, equity, logic, justice, and the public policy of discouraging premature and multiple lawsuits to require Levald to challenge the Ordinance before existence of the indispensable damage element of a taking claim for relief.

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18 "Airport noise" cases (*Bacon v. U.S.* [Ct Cl 1961] 295 F 2d 936; *Aaron v. U.S.* [Ct Cl 1963] 311 F 2d 798; *Jensen v. U.S.* [Ct Cl 1962] 305 F 2d 444; *Smart*, supra, 112 C App 3d at 239) show that courts exercise their equitable powers to apply statutes of limitations so as to *preserve* constitutional taking causes of action. This flexible approach is particularly appropriate here, as Levald suffered incremental and unpredictably timed damage until 1988.

If An Ordinance Is Unconstitutional, The Statute Of Limitations Is No Bar To Suit

Passage of years or decades does not shield the Ordinance from review for unconstitutionality:

> " 'The continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations,' a holding in line with appellate precedent. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) [citations]." (*Virginia Hosp. Ass'n. v. Baliles* [4th Cir 1989] 868 F 2d 653, 663)

In *Griswold v. Connecticut* (1965) 381 US 479, 527, this Court permitted a 1965 challenge of an 1879 statute claimed to be unconstitutional. Although nearly a century had passed since the Connecticut statute had been enacted, it did not prevent a challenge to the statute's constitutionality. Likewise, in *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US 470, a 1966 statute was challenged in a 1982 filing.

Here, the unconstitutional taking continues to cause new damage with each mobile home sale. Every time a mobile home is sold or a mobile home pad becomes vacant and Levald has to rent to the new tenant for less than fair rent, the Constitution is

violated. Analogously, in continuing nuisance law, each day a new cause of action accrues.[19]

Therefore, it is contrary to law to permit enforcement of this unconstitutional Ordinance merely because a year passed after its enactment. (*Dickinson*, 331 US at 749)[20] The statute of limitations should apply one year from damage, not from ordinance enactment.

If Levald's right to challenge the constitutional validity of the Ordinance on its face were lost before there was the damage prerequisite to a cause of action, local governments would be encouraged to disregard the Constitution, knowing that after an unlawful ordinance was adopted, the law would be immunized to all who did not sue within one year.

Even if only for the purpose of declaratory relief, it seems self-evident that passage of time should not

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19 "Over the years the courts . . . have maintained a preference for finding a *continuing* nuisance . . . to protect the plaintiff from . . . the statute of limitations . . . (*Baker v. Burbank-Glendale-Pasadena Airport Authority, supra*, 39 Cal.3d 862, 870, citing and quoting from *United States v. Dickinson* (1947) 331 U.S. 745, 749 . . .)." (*Capogeannis v. Superior Court* [1993] 12 C App 4th 668, 678-679; emphasis in original.)

20 58 Am Jur 2d, Nuisances, §275; 43 Cal Jur 3d, Limitation of Actions, §79.

insulate an unconstitutional ordinance from judicial review. [21]

Application Of A One-Year Statute Of Limitations To Levald's Regulatory Taking Claim In 1986 Deprives Levald Of Due Process Of Law

The Ninth Circuit failed to recognize that application of the one-year statute of limitations in 1986 to Levald's regulatory taking claim deprives Levald of due process of law.

In *Tulsa Professional Collection Services, Inc. v. Pope* (1988) 485 US 478, an assignee of a hospital's claim failed to make a timely (60 days from publication of notice of the commencement of probate proceedings) claim to Pope's executor, pursuant to the Oklahoma Probate Code.

This Court held that before the 60-day probate limitations period expired, if a creditor's identity were known or "reasonably ascertainable," the 14th

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21 In seeking declaratory relief, Levald relies on the equitable power of the Court. "In the federal courts, statutes of limitation do not apply to actions seeking equitable relief, which can only be barred by laches . . . ." (22A Am Jur 2d, *Declaratory Judgments*, §184) This is a time-honored principle: "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief . . . ." (*Holmberg v. Armbrecht* [1945] 327 US 392, 396; *Castner v. First National Bank of Anchorage* [9th Cir 1960] 278 F 2d 376, 385)

Amendment's due process clause required that the creditor receive actual notice of the probate court opportunity to make a claim before the probate limitations period began to run. (*Tulsa*, 485 US at 491)

Here, in 1988, the Ordinance first adversely affected Levald's protected property interests. Levald would never have a remedy and would be deprived of due process of law if the one-year statute in California Code of Civil Procedure §340(3) ran upon Ordinance enactment in 1986 — before Levald sustained damage.

CONCLUSION

This case presents an instance of the confusion endemic in the decisions that analyze the nexus between ripeness and statute of limitations issues. Here, the Ninth Circuit made the contradictory holding that Levald's claim was statute of limitations time-barred before it was ripe.

Levald's regulatory taking claim for facial invalidity of the Ordinance is timely because until Levald suffered sufficient damage from enforcement of the Ordinance to warrant bringing suit to enforce Levald's claim:

- the claim for relief did not exist; and
- the statute of limitations did not begin to run.

This Court's guidance is needed. Levald prays that certiorari be granted or the matter be remanded to the Ninth Circuit for reconsideration under the precedents herein.

Respectfully submitted,

FADEM & DOUGLAS
A Professional Corporation

JERROLD A. FADEM
ANDREW H. KOPKIN
Counsel of Record

Attorneys for Petitioner
Levald, Inc.

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEVALD, INC., *Plaintiff-Appellant,* v. CITY OF PALM DESERT, *Defendant-Appellee.*	No. 91-56315 D.C. No. CV-91-1180-LEW OPINION

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted
February 4, 1993 — Pasadena, California

Filed July 8, 1993

Before: Procter Hug, Jr. and Diarmuid F. O'Scannlain, Circuit Judges, and John W. Sedwick, **/* District Judge

Opinion by Judge O'Scannlain

**/* The Honorable John W. Sedwick, United States District Judge for the District of Alaska, Sitting by designation.

SUMMARY

Civil Litigation and Procedure/Statutes of Limitation/Pleading/Individual Rights/Constitutional Rights

The court of appeals affirmed in part and reversed in part a judgment of the district court and remanded. The court held that a 42 U.S.C. Section 1983 claim that challenged a California municipal ordinance as unconstitutional on its face as a taking of property without just compensation accrued upon final passage of the ordinance, even though the municipality had not actually denied compensation, because the unavailability of a remedy for regulatory takings under California law at the time the ordinance was enacted was the functional equivalent of the denial of just compensation.

Appellant Levald, Inc., owned a mobile home park in the City of Palm Desert, appellee. Levald rented space to mobile home owners. The park was subject to the California Mobile Home Residency Law, which placed restrictions on Levald's termination of tenancies, prohibited Levald from requiring the removal of mobile homes from the park when they were sold and from charging a transfer fee when mobile homes were sold, and prohibited Levald from disapproving a mobile home purchaser who had the ability to pay rent. In 1986, the City passed a rent and vacancy control ordinance prohibiting Levald from

raising the rent for a park space when it became empty or when a mobile home was sold.

In 1989, Levald filed suit against the City under Section 1983, alleging takings and due process violations under both the federal and state constitutions. The district court dismissed the complaint, holding that the takings claim was time-barred and that the substantive due process allegations failed to state a claim. Levald moved to amend its complaint with respect to the latter claim, which the court denied without comment. Levald appealed.

[1] It is the taking of property without just compensation that the Fifth Amendment proscribes. Thus, a Section 1983 claim does not accrue until the government denies such compensation. [2] However, when the state has expressly rejected the claimant's theory, state remedies are therefore inadequate, and that unavailability of remedy is the functional equivalent of the government's denial of just compensation. [3] In Levald's case, California did not provide a remedy for regulatory takings until after the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Thus, because there was no appropriate state remedy, Levald's Section 1983 claim accrued upon final passage of the City's ordinance in 1986. The California limitation on Section 1983 actions accruing after 1985 is one year. Thus, Levald's 1989 filing was untimely.

[4] The ordinance survived substantive due process challenge if it was designed to accomplish an ob-

jective within the government's police power and a rational relationship existed between its provisions and its purpose. [5] The stated purposes of the City's ordinance were similar to the goals underlying other rent control ordinances that had been held by the Supreme Court to be legitimate purposes. [6] A rational legislator could have believed that the ordinance would further its legitimate goals. How well the ordinance's goals were served by its provisions was a legislative question, not one for the courts on substantive due process review. The dismissal of Levald's claim was proper.

[7] The court could refuse to permit Levald to amend its complaint if it determined that an amended pleading could not withstand a motion to dismiss. However, outright refusal to permit amendment without any justifying reason was an abuse of discretion. [8] Here, the court gave no reason and none was apparent from the record. Remand was therefore necessary to allow the district court to explain its reasons for refusing to allow Levald's amendment.

COUNSEL

Jerrold A. Fadem and Andrew H. Kopkin, Fadem & Douglas, Los Angeles, California, for the plaintiff-appellant.

Michael J. Andelson and Kandy Lee Allen, Best, Best & Krieger, Rancho Mirage, California, for the defendant-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to consider, yet again, a takings challenge to mobile home rent control laws.

I

Levald, Inc. owns a mobile home park in the city of Palm Desert, California. Residents of the park own their mobile homes but rent pads from Levald. Levald provides private streets and common areas, along with other lesser amenities. The vast majority of mobile homes are never moved once they are placed in the park.

The park is subject to California's Mobile Home Residency Law, California Civil Code § 798 et seq.

("the residency law"). The impetus for the residency law was the legislature's finding that "because of the high cost of moving mobile-homes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by provisions of this chapter." Cal. Civ. Code § 798.55(a). The residency law severely limits the ability of the mobile home park owner to terminate the tenancy of the mobile home owner, and provides that the park owner may not require the removal of a mobile home when it is sold. Moreover, the residency law prohibits the park owner from charging a transfer fee for the sale, and the park owner may not disapprove a purchaser as long as the purchaser has the ability to pay rent.

In 1985, Palm Desert passed a vacancy control ordinance to supplement an already-existing rent control ordinance. The vacancy control ordinance prohibited mobile home park owners from increasing the rent for a mobile home space when that space became vacant or the ownership of a mobile home was transferred. In 1986, Palm Desert repealed the rent control and vacancy control ordinances and reenacted their provisions in Palm Desert Ordinance No. 456. Under the ordinance, a park owner may apply for a hardship rental increase through various procedures outlined in the city's Rent Review Board Guidelines.

According to Levald, the combined effect of the residency laws and the ordinance ("the statutory scheme") is that a property interest is transferred from the landlord to its tenants: the right perpetually to occupy park spaces at below-market rents. Levald asserts the right has a market value that park tenants are able to capture when they sell their mobile homes to third parties. The premium that the new buyer must pay is equal to the difference between the rent controlled price and the fair market price over the expected life of the statutory scheme, discounted to present value. Thus, the argument goes, incoming tenants do not get the benefit of the lower rents since the lower rents are offset by the premium.

In 1989, Levald filed suit against Palm Desert. The complaint alleges violations of the Takings and Due Process Clauses of the United States Constitution, along with the California Constitution. On September 9, 1991, the district court dismissed the complaint, concluding that the takings claims were barred by the statute of limitations and that Levald had failed to state a claim for a violation of the sub

stantive due process clause. The district court declined to exercise supplemental jurisdiction over the pendent state law claims. Levald appeals. [1]

II

The Takings Clause of the Fifth Amendment provides: "[N]or shall property be taken for public use, without just compensation." Takings claims are divided into two classes: permanent physical occupation claims and regulatory takings. *Compare, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (physical occupation) *with Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978) (regulatory taking). A physical occupation occurs when the government physically intrudes upon private property either directly or by authorizing others to do so. *Loretto*, 458 U.S. at 426. A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical occupation of the property. "Where the government authorizes a physical occupation of property (or actually takes ti-

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1 Palm Desert's motion to strike from Levald's brief factual allegations not in the record below is granted. The amended complaint that was lodged with, but not accepted for filing by, the district court is not part of the record on appeal and we thus do not consider factual allegations that were presented to the district court only in it. *See United Staes v. Sanchez-Lopez*, 879 F.2d 541, 548 (9th Cir. 1989); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). Moreover, the allegations do not concern facts that are judicially noticeable under Fed. R. Evid. 201(b).

tle), the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *see Loretto*, 485 U.S. at 426 (installation of television cables, although only occupying one and one half cubic feet, represented a physical occupation and thus a per se taking). "But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee*, 112 S. Ct. at 1526; *see Penn Central*, 438 U.S. at 123-25 (regulation that prohibited Penn Central from building a fifty-five story office tower over its Grand Central Terminal drastically diminished the value of Penn Central's Property, but did not amount to a taking). Because determining whether a regulatory action effects a taking requires "complex factual assessments of the purposes and economic effects of government actions," *Yee*, 112 S. Ct. at 1526, while any physical occupation by the government is a taking per se, much turns on the classification of the government's action.

A

In *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), *overruled by Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), the Ninth Circuit considered whether a statutory scheme almost identical to the one challenged here could amount to a permanent physical occupation and

thus a per se taking. The *Hall* court concluded that the appellants' claim that the mobile home rent control ordinance transferred from the landlords to the tenants a possessory interest in the land, consisting of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent, was indeed a physical occupation claim. *Id.* at 1276-77.

Levald relied on *Hall* before the district court, arguing that the government had taken its property through a permanent physical occupation. After the district court reached its decision, however, the Supreme Court overruled *Hall* in *Yee v. City of Escondido,* 112 S. Ct. 1522 (1992). The Court held that the rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, in no way authorized a compelled physical invasion of the property because the landlords "voluntarily rented their land to mobile home owners." *Id.* at 1528. The Court noted that "neither the City nor the State *compels* petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice." *Id.* (emphasis added). The Court reserved, however, the question whether the combined effects of the mobilehome residency law and the rent control ordinance could amount to a *regulatory* taking. *Id.* at 1530-31.

Because the Supreme Court extinguished any chance that Levald could prevail on a physical occupation theory, Levald seeks to argue for the first time

on appeal that the statutory scheme effects a regulatory taking. Palm Desert argues that since Levald did not raise this argument to the district court, it is barred from raising it on appeal.

We are persuaded that Levald may make its regulatory takings argument on appeal. The Supreme Court's opinion in *Yee* is instructive. Although the *Yee* Court did not consider the merits of the regulatory takings claim because it was outside the scope of the grant of certiorari, the Court "reject[ed] the respondent's contention that the regulatory taking argument is not properly before [the Court] because it was not made below." *Id.* at 1532. The Court noted: "Petitioners unquestionably raised a taking claim in the state courts. The question whether the rent control ordinance took their property without compensation . . . is thus properly before us." *Id.* The Court continued:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are rather separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim [below], therefore, petitioners could have formulated any

> argument they liked in support of that claim here.

Id. (emphasis in original) (citations omitted). Following that reasoning, we conclude that Levald's regulatory taking claim is not foreclosed by *Yee's* rejection of the physical occupation theory.

B

In addition to the division into physical occupation and regulatory takings, takings claims are divided into "facial" and "as-applied" challenges. A facial challenge involves "a claim that the mere enactment of a statute constitutes a taking," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). As the *Keystone* Court noted, there is "an important distinction" between the two types of claims. Among other things, each raises different ripeness and statute of limitations issues. Here, we consider Levald's facial and as-applied claims in turn.

1

a

We must first consider whether Levald's facial challenge is ripe. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S.

172 (1985), placed "two hurdles in the way of a takings claim brought in federal court against states and their political subdivisions." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989). The first hurdle—that the claimant must seek a final decision regarding the application of the regulation to the property at issue for the government entity charged with its implementation—does not apply to facial challenges, and is therefore not applicable here. *Yee*, 112 S. Ct. at 1532.

"The second, and independent, hurdle established by *Williamson County* requires plaintiffs to 'seek compensation through the procedures the State has provided for doing so' before turning to the federal courts." *Sinaloa*, 882 F.2d at 1402 (quoting *Williamson*, 473 U.S. at 194-95). *Williamson*, however, does not require the plaintiff to bring a state court action where it would be futile under existing state law. *Williamson*, 473 U.S. at 196-97; *Sinaloa*, 882 F.2d at 1402. "[T]he appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occur[red]." *Sinaloa*, 882 F.2d at 1402. Here, the taking at issue in the facial challenge allegedly occurred at the time the ordinance was enacted—in 1986. California did not recognize actions for inverse condemnation based on *regulatory* takings until *after* the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Therefore, even though Levald did not seek remedies in state court, it was not required to do so because it would have been futile to seek state court re-

lief at the time the alleged taking occurred. The claim is ripe.

b

We next consider whether, as the district court concluded, Levald's facial claim is barred by the statute of limitations. Levald argues (1) the district court erred in raising the statute of limitations issue sua sponte, (2) the law of the case is that the facial challenge is timely, and (3) in any event, the statute of limitations does not bar the facial claim.

Levald filed its complaint on August 23, 1989. Palm Desert moved to dismiss the complaint as, among other things, untimely under the statute of limitations. Judge Letts denied the motion. Palm Desert then filed its answer, pleading the statute of limitations as an affirmative defense. The case was transferred, ultimately ending up before Judge Waters. Palm Desert then brought a motion to dismiss the takings claim on ripeness grounds and to dismiss the due process claim for failure to state a claim. Although Palm Desert did not raise the statute of limitations defense in that motion, the district court rested its dismissal of the takings claim on that ground.

The district court properly entertained the statute of limitations issue. Although we have never considered this precise question in the statute of limitations context, we have held that a sua sponte dismissal was not erroneous in an analogous context. In *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir.

1986), after the plaintiff filed its complaint, the district court dismissed the complaint sua sponte for lack of venue. Although the defendant in that case had never raised the venue issue, the court concluded that he had not waived lack of venue as an affirmative defense because he had not yet filed a responsive pleading. *Id.* The court continued: "In the absence of a waiver, we can find no reason to hold that the district court erred in raising the issue of defective venue on its own motion." *Id.*

Other circuits have addressed the precise question at issue here and have concluded that the district court may sua sponte dismiss a complaint as untimely so long as the defendant has not waived the defense. *See, e.g., Leonhard v. United States,* 633 F.2d 599, 609 n.11 (2d Cir. 1980) (affirming the district court's sua sponte dismissal on statute of limitation grounds, noting that the defendant had pleaded the statute of limitations as a defense in his answer), *cert. denied,* 451 U.S. 908 (1981); *see also Street v. Vose,* 936 F.2d 38, 41 (1st Cir. 1991) (upholding sua sponte dismissal of complaint on statute of limitations grounds); *Burrell v. Newsome,* 883 F.2d 416, 418 (5th Cir. 1989) ("While this Court generally will not consider an affirmative defense not raised below, we are not prevented from considering the defense where it is raised *sua sponte* by the district court."). *Cf. Wagner v. Fawcett Publications,* 307 F. 2d 409, 412 (7th Cir. 1962) (where the defendant *waived* the statute of limitations defense, the district court could not raise it sua sponte).

Here, Palm Desert pleaded the statute of limitations in its answer, and thus preserved the defense. Moreover, Levald had the opportunity to present argument on the statute of limitations question before the district court and on appeal. Thus, we are not troubled by the fact that Palm Desert had not raised the defense in the particular motion before the district court.

Levald's argument regarding the law of the case is also without merit. Regardless whether it was appropriate or prudent for Judge Waters to revisit the statute of limitations question when Judge Letts had already ruled on it, there is nothing that insulates either judge's conclusion from appellate review. We therefore consider the merits of the statute of limitations argument.

[1] To determine when the statute of limitations period begins to run, we first must determine when the cause of action accrued. Determining when the cause of action accrues is merely the corollary to the ripeness inquiry. A plaintiff asserting a facial challenge contends that the passage of the ordinance effects a taking. However, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking *without just compensation*." *Williamson*, 473 U.S. at 194 (emphasis added). "So long as the state provides 'an adequate process for obtaining compensation,' no constitutional violation can occur" until just compensation is denied. *Sinaloa*, 882 F.2d at 1402 (quoting *Williamson*, 473 U.S. at 194-95). Thus, a plaintiff cannot bring a section 1983 action in federal court until the state denies just compensation.

A claim under section 1983 is not ripe—and a cause of action under section 1983 does not accrue—until that point.

[2] As our ripeness cases teach, there is an exception to this general rule. We do not require a claimant to seek relief in state court as a prerequisite to filing a section 1983 claim in federal court when it would be futile to do so. *See, e.g., Austin v. City and County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir. 1988). Where the state has expressly rejected the plaintiff's theory of the case and therefore the state remedies are inadequate, we consider the unavailability of a state remedy to be the functional equivalent of the denial of just compensation. In this small class of cases, the cause of action accrues and the limitations period begins to run upon the enactment of the statute.

This is consistent with our decision in *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991). In that case, we held that the facial takings claim accrued upon the passage of the ordinance. *Id.* at 1087. Although *De Anza* did not discuss the ripeness question, it is clear that it would have been futile for the claimant to seek compensation in California courts at the time the alleged taking occurred. The ordinance was passed in 1982, before California law recognized inverse condemnation claims based on regulatory takings. *De Anza* thus stands for the proposition that in cases in which it would be futile to seek compensation in state court, a facial challenge to a statute as a taking without just compensation under section 1983 accrues upon the

passage of the ordinance. *See also Azul-Pacifico v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (on rehearing) (cause of action accrued when the ordinance was passed in 1982, before California law recognized regulatory takings). To read *De Anza* more expansively—interpreting it to hold that *all* facial challenges accrue upon the passage of the legislative enactment—would be in conflict with the Supreme Court's decision in *Williamson*.

[3] Here, as Levald itself recognizes, it would have been futile to seek compensation in state court where the ordinance was passed because California law provided no remedy for regulatory takings at that time. *Supra* Part II.B.1.a; *see Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991). Since the unavailability of state remedies is the functional equivalent of the denial of just compensation, Levald's cause of action under section 1983 accrued upon the passage of the ordinance. The statute of limitations for all section 1983 claims in California accruing after 1985 is one year. *See Wilson v. Garcia*, 471 U.S. 261 (1985); *De Anza*, 936 F.2d at 1085. In this case, the final version of the ordinance was passed in 1986; the complaint was not filed until 1989. By the time Levald filed the complaint, the limitations period had run.

Levald argues that because in other contexts the Supreme Court has allowed challenges to statutes long after they were enacted, Levald should be allowed to bring an action challenging the enactment of a statute as a taking without just compensation at any point. This argument misapprehends the differ-

ences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until the statute is enforced—in other words, until it is applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Levald further argues that the cause of action in this case did not accrue until property values in Palm Desert increased dramatically years following enactment. This argument fails to acknowledge the distinction between a facial and an as-applied challenge: while the rising property values may be relevant to an as-applied challenge, they are not relevant to a claim that the very enactment of the statute effected a taking.

Levald finally contends that the statute of limitations is inapplicable to its claim for declaratory judgment. This argument is meritless. As the First Circuit held in a similar takings case:

> To prevent plaintiffs from making a mockery of the statute of limitations by the simple expedient of creative labelling—styling an action as one for declaratory relief rather than for damages—courts must necessarily focus

> upon the substance of an asserted claim as opposed to its form. It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy.

Gilbert v. City of Cambridge, 932 F.2d 51, 57-58 (1st Cir. 1991) (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947), and *Russell v. Todd*, 309 U.S. 280, 289 (1940)). Therefore, if " 'a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern.' " *Id.* at 58 (quoting *Orangetown v. Gorsuch*, 718 F.2d 29, 42 (2d Cir. 1983)). Whether styled as a claim for damages or one for declaratory judgment, the facial challenge is time barred.

2

In addition to its facial challenge, Levald asserts on appeal that it has stated an as-applied takings claim. The nature of the as-applied challenge, however, is not clear; neither the briefs nor the complaint spells out precisely how Levald believes the *application* of the statute has effected a taking. The gravamen of Levald's complaint is that the statutory scheme does not substantially advance its stated purpose because most tenants—those other than the incumbents—will pay a premium equal to the expected difference between the rent controlled price and the

market price discounted to present value. Future tenants thus will *not* pay less than market value for housing. Thus, the argument goes, insofar as the purpose of the statute is to control spiraling housing costs for future tenants, the statutory scheme does not substantially advance its purpose. The statute operates solely as a transfer of wealth from the landlord to the existing tenant. That argument, however, is relevant only to a *facial*, not an as-applied, regulatory challenge. It is not a particular *application* of the statute that gives rise to the premium; the premium arises solely from the existence of the statute itself. [2] Given that the existence of the premium does not give rise to an as-applied challenge, it seems that an as-applied challenge would have to focus on the reasonableness of the return on Levald's investment—in other words whether the allowable rent increases are large enough—and not on the "transfer" of the premium. Such a claim is not clearly stated in Levald's original complaint, nor has Levald clearly stated any other basis for an as-applied challenge in this case. [3]

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2 The *size* of the premium will obviously fluctuate. However, Levald's claim does not focus on the size of the premium; rather, it is the existence of the transfer that forms the basis of Levald's claim.

3 We emphasize that we do not hold that it would be impossible for a litigant to make such an argument. We merely note that Levald has not spelled out the nature of an as-applied claim.

Despite Levald's failure to articulate clearly the basis for its as-applied challenge, we will assume arguendo for purposes of this appeal that the complaint can be construed to state an as-applied claim. We must conclude, however, that Levald has not satisfied the second ripeness requirement. Levald has not sought compensation in state court, nor has it shown that "the state courts [have] establish[ed] that landowners may not obtain just compensation through an inverse condemnation action under any circumstances." *Austin*, 840 F.2d at 681. Indeed, California has recognized inverse condemnation claims based on as-applied regulatory takings since the Supreme Court decided *First Evangelical Lutheran Church*, 482 U.S. 304 (holding that California's denial of compensation for inverse condemnation claims based on regulatory takings was unconstitutional). *Schnuck*, 935 F.2d at 173-74. [4]

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[4] While California did not recognize a remedy for regulatory takings before 1987, any as-applied challenge that accrued before the availability of the remedy in 1987 would be untimely under the one year statute of limitations for § 1983 actions. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173-74 (9th Cir. 1991). As-applied regulatory takings must be brought under § 1983. *Azul-Pacifico*, 973 F.2d at 705. As discussed above, the statute of limitations for § 1983 claims in California is one year. *Wilson v. Garcia*, 471 U.S. 261 (1985). Any taking that resulted from the application of the ordinance prior to 1988—one year before the complaint was filed—would be barred as untimely.

Levald contends that notwithstanding the Supreme Court's decision in *First Evangelical*, it would be futile to seek relief in California courts because the "California courts defy the United States Supreme Court." We rejected this very argument in *Schnuck*, 935 F.2d at 174, in which we held that the appellant's allegation of mere generalized hostility of the state courts to takings claims does not excuse [the claimant's] failure to seek relief there." Rather, in order to be excused from this requirement, the appellant must show that the state has explicitly rejected its theory of the case. *Id.* Levald has not done so.

At the time Levald filed suit, California courts refused to follow *Hall v. City of Santa Barbara*, thus rendering it futile to seek compensation on a *physical occupation* theory in state court. However, at the time Levald filed suit, California courts did recognize regulatory takings—Levald's only viable theory. Levald is obliged to seek compensation in state court before it can seek relief under section 1983 on an as-applied takings theory.

In so holding, we in no way mean to suggest that the doors to the federal courthouse will remain permanently closed to Levald or to other litigants in Levald's position. Rather, if Levald cannot obtain relief through the state procedures available to it, Levald will have the right to a federal determination of whether the ordinance, as applied to it, "unjustly imposes a burden on [Levald] that should 'be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons.' "

Yee, 112 S. Ct. at 1530 (quoting *Penn Central*, 438 U.S. at 124).

III

A

Levald argues that the district court improperly dismissed its substantive due process claim.

[4] In reviewing economic legislation on substantive due process grounds, we give great deference to the judgment of the legislature. "[O]rdinances survive a substantive due process challenge if they were *designed to* accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinances." *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988) (quoting *Scott v. City of Sioux City*, 736 F.2d 1207, 1216 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985)). Unlike in the takings context, there is no requirement that the statute *actually* advance its stated purpose; rather, the inquiry focuses on whether "the governmental body *could* have had no legitimate reason for its decision." *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir. 1986) (en banc) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)). "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to cor-

rect it." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955).

[5] Here, the stated purposes of the ordinance were to alleviate hardship created by rapidly escalating rents; to protect owners' investments in their mobile homes; to equalize the bargaining position of park owners and tenants; and to protect residents from unconscionable and coercive changes in rental rates. These purposes are similar to those advanced in support of other rent control ordinances; the Supreme Court has held that these goals are legitimate. *See Pennell v. City of San Jose*, 485 U.S. 1, 13-14 (1988).

[6] Moreover, a rational legislator could have believed that the rent control ordinance would further the stated goals, at least insofar as the purpose is to protect existing tenants. For example, a rational legislator could have believed that the unfettered right of a park owner to raise the rent on a space when ownership of a mobile home was transferred might make it difficult for a mobile home owner to sell. The legislator thus could have believed that the ordinance protects owners' investments in their units. It may be true that in operation the ordinance does nothing more than take "money from the landlord and put[] it into the pocket of a tenant who no longer resides at the park." *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 958 (9th Cir. 1991), *vacated*, 113 S. Ct. 4943 (1992), *reinstated in part*, 987 F.2d 662 (9th Cir. 1993). However, while one might believe that the ordinance is an ineffective—and indeed draconian—means by which to effect its goals, "[h]ow well

the ordinance serves [its] purpose[s] is a legislative question, one the court will not consider" in the context of a substantive due process challenge. *Id.* Dismissal of the substantive due process claim was proper.

B

Levald next argues that its motion for leave to amend was improperly denied. After determining that the ordinance on its face met the rational relation test, the district court in its September 9, 1991, order stated the following:

> The substantive due process claim as written in the complaint constitutes only facial challenges to the Ordinance. As such, it is dismissed without *prejudice* because the plaintiff might be able to state a claim for violation of due process as applied, if, for example, it alleges that it had applied for an increase under the Ordinance and was not given an amount constituting a fair amount of its investment.

Final judgment was entered on all claims on September 12, 1991. Levald moved for clarification of this order, requesting a due date for filing an amended complaint. On October 8, 1991, the district court denied the motion without comment and refused to allow Levald to file an amended complaint.

As a preliminary matter, we must determine whether this court has jurisdiction to consider the denial of leave to amend. [5] After the district court denied the motion, Levald filed a notice of appeal indicating that it was appealing the September 9th order. Levald did not indicate in the notice of appeal that it also intended to appeal the denial of leave to amend.

Federal Rule of Appellate Procedure 3(c) provides that "[t]he notice of appeal shall . . . designate the judgment, order or part thereof appealed from."

> While some circuits construe Rule 3(c) strictly, this circuit has held that "a mistake in designating the judgment appealed from should not bar appeal so long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." In determining whether "intent" and "prejudice" are present, we apply a two-part test: first, whether the affected party had notice of the issue on appeal; and second, whether the affected party had an opportunity to fully brief the issue.

---

5 Although Palm Desert does not raise this argument, we must raise issues concerning our jurisdiction *sua sponte*.

Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1481 (9th Cir. 1986) (citations omitted), *aff'd*, 488 U.S. 347 (1989). Here, the denial of leave to amend the complaint was addressed in Levald's opening brief. We have previously held in similar circumstances that this is enough to demonstrate that the appellee had notice of the issue and did not suffer prejudice from the appellant's failure to specify the order in the notice of appeal. *See, e.g., Meehan v. County of Los Angeles*, 856 F.2d 102, 105-06 (9th Cir. 1988). We thus reach the merits of Levald's argument.

2

[7] A district court's denial of plaintiff's request to amend its complaint pursuant to Federal Rule of Civil Procedure 15(a) is reviewed for abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). "A court is within its discretion to refuse amendment and dismiss the complaint if it 'concludes that the pleading as amended could not withstand a motion to dismiss.' " *Hoover v. Langston Equip. Assocs., Inc.*, 958 F.2d 742, 745 (6th Cir. 1992) (citations omitted). However, the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[8] Here, the district court gave no reason for denying Levald leave to amend the complaint. Nor is the reason for the denial apparent from the record.

See DCD Programs Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) ("in the absence of written findings or a record which clearly indicates reasons for the district court's denial, this court will reverse a denial of leave to amend"). The district court dismissed the claim "without prejudice," implying that the defects in the complaint were not unremediable. *See id.* at 187. The court stated that an allegation "that [Levald] had applied for an increase under the ordinance and was not given an amount constituting a fair return on its investment would perhaps be sufficient to state an as-applied due process claim. The proposed amended complaint alleged precisely that:

> [27] The Ordinance as applied to Levald deprives Levald of property without due process of law.
>
> [28] By the Rent Review Board's enforcement policy of the Ordinance: Levald is not able to receive a fair return on the value of Levald's property or on its capital improvements. The value of Levald's investment does not even keep pace with inflation. [6]

---

6 Although the amended complaint is not part of the record as defined by Fed. R. App. P. 10(a), we consider the contents of it for the limited purpose of determining whether the district court abused its discretion in failing to allow Levald to file the complaint. *See DCD Programs Ltd. v. Leighton*, 833 F.2d 186 (9th Cir. 1987).

Even though the amended version of the complaint seemed to comply with the direction provided by the court, the court refused to grant leave to amend. Since the district court did not provide an explanation for its refusal to allow Levald to amend its complaint and since its reasons are not apparent from the record, we conclude that the district court abused its discretion in failing to explain its reasons for denying leave to amend the complaint. We thus remand for explanation.

IV

Levald argues that the district court erred in declining to exercise supplemental jurisdiction over its state law claims.

28 U.S.C. § 1367 (c) provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim . . . if —
>
> . . .
>
> (3) the district court has dismissed all claims over which it has original jurisdiction . . . .

Here, the district court properly exercised its discretion under section 1367(c)(3) and declined to retain the pendent state claims after it dismissed all of the other claims in the complaint.

V

AFFIRMED in part, REVERSED and REMANDED in part. Palm Desert is awarded costs on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 3 1993

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

LEVALD, INC.,	)	No. 91-56315
Plaintiff-Appellant,	)	D.C. No. CV-91-1180-LEW
v.	)	ORDER
CITY OF PALM DESERT,	)	
Defendant-Appellee.	)	

Before: HUG and O'SCANNLAIN, Circuit Judges, and SEDWICK,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Hug and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Sedwick has so recommended.

* The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ENTERED	FILED
CLERK	SEP 9 1991
SEP 12 1991	CATHY A. CATTERSON, CLERK
CENTRAL DISRICT	CENTRAL DISTRICT
OF CALIFORNIA	OF CALIFORNIA

LEVALD, INC., a Wisconsin corporation, Trustee of Indian Springs Trust,	)	Case No. CV 91-1180-LEW
Plaintiff,	)	ORDER RE DEFENDANT'S MOTION TO DISMISS COMPLAINT
v.	)	
CITY OF PALM DESERT, a California municipal corporation,	)	
Defendant.	)	

TO ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE,

Defendant's motion to dismiss the Complaint cam on for hearing before the Honorable Laughlin E. Waters, Senior United States District Judge, on May 13, 1991. Based on the documents filed for this motion, oral arguments and the case file, the Court holds as follows:

Facts

On November 14, 1985, the City of Palm Desert (the "City") added a vacancy control provision (City Ordinance #442) to its mobile home rent control ordinance. The City added this provision because of perceived abuses in the form of excessive rent increases by mobile home park operators at the time of sale or transfer of a mobile home.

City Ordinance No. 456 (the "Ordinance") reenacted the entire mobile home rent control ordinance on March 27, 1986, including the vacancy control provision. In its preamble, the Ordinance noted the shortage of spaces for mobile homes within the city limits, the rapidly escalating rents and unreasonable changes in park rules and regulations and the sizeable investments of mobile home owners in their homes which the marketplace imbalance put at significant risk. The Ordinance also stated that the purpose of these provisions was to alleviate these hardships while "simultaneously providing for the needs of park owners to receive a just and reasonable re-

turn on their property." Under the Ordinance, a park owner may apply for a hardship rental increase through various procedures and the City Rent Review Board Guidelines.

The plaintiff is the owner of a mobile home park located in the City of Palm Desert. In this action, plaintiff challenges the City's various mobile home rent control laws in existence since 1985. Claim One is a substantive due process claim that alleges that the Ordinance does not advance a legitimate government purpose. Specifically, this claim alleges that the Ordinance takes plaintiff's property right to determine who, if anyone, occupies its property and that tenants earn a premium on the sale of their homes which should go to plaintiff. Further, this claim alleges that the Ordinance does not accomplish its stated goal since it does not limit the price at which tenants can sell their mobile home. As a result, plaintiff requests over $3 million in damages. Claim Two requests compensation for inverse condemnation. It alleges that the Ordinance effects a physical taking of plaintiff's property without just compensation since plaintiff cannot raise rents to market level, capture the premium a mobile home owner earns on the sale of her home, nor determine who will occupy the property. Finally, Claim Three requests declaratory relief ruling that the Ordinance is an unconstitutional taking.

This case has enjoyed a rather long and complicated procedural history. Plaintiff filed this complaint on August 23, 1989, before Judge Letts. The City responded to the complaint with a motion to

dismiss. In its motion, the City advanced several theories, including lack of ripeness for failure to exhaust state court remedies and statute of limitations. Judge Letts denied the motion on November 7, 1989. The City then filed its answer to the complaint, preserving the lack of ripeness for failure to exhaust state court remedies as an affirmative defense.

On October 31, 1990, the City filed the first of two motions for summary judgment, requesting the court to find that diversity jurisdiction does not exist in this case. In the meantime, the case was transferred to Judge Taylor. On December 17, 1990, Judge Taylor issued an order determining that no such diversity exists. On December 24, 1990, the City filed the second motion for summary judgment in addition to a motion for judgment on the pleadings. On January 15, 1991, the court denied the following:

1. defendant's motion to dismiss the state inverse condemnation claim because California law does not recognize plaintiff's claim;

2. defendant's motion to limit damages to those incurred one year before the claim was filed;

3. defendant's motion to dismiss both conduct and facial substantive due process challenges of the Ordinance for failure to state a claim;

4. defendant's motion to dismiss conduct and facial substantive due process challenges of the Ordinance because they are subsumed by plaintiff's federal taking claim.

In the same order, the court granted defendant's motion to bar plaintiff from recovering future damages because they are too speculative and defendant's motion to dismiss plaintiff's substantive due process facial challenge to the Ordinance as untimely.

On March 4, 1991, this case was transferred to this court. Defendant brings this present motion to dismiss on grounds of failure to exhaust state court remedies and to state a substantive due process claim. Plaintiff counters that the takings claim should not be dismissed since the district court already decided that the takings claim is ripe in its 1989 order and that this court should defer to that decision. Further, plaintiff claims that its takings claim made under Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988) is ripe since one California appellate court did not recognize Hall claims as worthy of relief. Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990), review denied, 1991 Cal. Lexis 353 (Cal. 1991). Plaintiff also defends its substantive due process claim in an oblique argument which states that the complaint alleges that the Ordinance does not advance a legitimate government interest, that the City's declared purpose for enacting the Ordinance does not accomplish the goal and that the City's conduct is both irrational and arbitrary.

Discussion:

Plaintiff claims that defendant does not have the right to bring on this subsequent motion to dismiss after Judge Letts denied defendant's earlier motion. Plaintiff's argument has no merit. The lack of ripeness and statute of limitations defenses raised by defendant in the first motion dismiss are not waivable. Fed. R. Civ. Pro. 12(b), (h) (2); Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 560 (5th Cir. 1985). Since these defenses are not waivable, denial of the earlier motion on these grounds does not bar defendant from raising them in the present motion. See Van Voorhis v. District of Columbia, 240 F. Supp. 822, 824 (D.DC 1965).

A. Taking Claims

In Claims Two and Three of the complaint, plaintiff alleges an unconstitutional taking of property by the City in violation of the Fifth and Fourth Amendments. According to plaintiff, the Ordinance and its vacancy control provisions enable the departing tenants of the Park to sell the right to occupy a rent-controlled space, as evidenced by a supposed premium received in the sale price of the mobile home, far in excess of the appraised value of the mobile home. Plaintiff alleges that such a sale constitutes an unconstitutional taking of property without compensation because plaintiff does not benefit from the appropriation of this right to sell the right to occupy the rent-controlled space. Further, plaintiff alleges that the Ordinance's provisions which control

when rents can be raised constitute a taking without just compensation. Plaintiff claims that its facial challenges are recognizable physical taking claims under Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988), which made the novel and unprecedented conclusion that such mobile home regulations can constitute a physical taking.

Plaintiff's facial taking claims are dismissed because they are barred by the statute of limitations for claims brought under the Civil Rights Act, 42 U.S.C. §1983 (1990). Prior to this case, this court had dismissed similar challenges to city ordinances controlling mobile home rent rates on the grounds that plaintiffs had failed to exhaust state remedies and that, therefore, their claims were not ripe for federal adjudication. E.g., New Horizon Land Co. v. City of Carson, No. CV 90-1145 (C.D. Cal. 1990); Caliente Sands, Ltd. v. City of Cathedral City, No. CV 90-2662 (C.D. Cal. 1990). The law in this area, however, is changing and developing so rapidly both at the Ninth Circuit and at the California state court levels that the grounds for dismissing this and similar cases have changed.

In sum, the ripeness argument was unabashedly rejected by Judge Kozinski's decision in Sierra Lake Reserve v. City of Rocklin, __ F.2d __, No. 89-15371, slip op. at 8463 (9th Cir. July 9, 1991). Just prior to that decision, however, Judge Schroeder ruled that takings claims brought pursuant to §1983 are barred by the statute of limitations unless filed within one year of the date the ordinance was enacted. De Anza

Properties X, Ltd., et al. v. County of Santa Cruz, __ F.2d __, No. 89-15750, slip op. at 7983 (9th Cir. June 28, 1991). Finally, recent state court cases have dismissed such Hall facial claims, ruling that California does not recognize such claims. See, e.g., Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990), review denied, 1991 Cal. Lexis 353 (Cal. 1991). Yet in Kirkpatrick, et al. v. City of Oceanside, et al., 91 Daily Journal D.A.R. 8587 (July 18, 1991), the appellate court ruled that as applied challenges, as opposed to facial ones, involve factual questions that may merit consideration by California courts.

The ripeness grounds used by this court were based on the ruling in Sinaloa Lake Owners Ass'n. v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. denied, 110 S.Ct. 1317 (1990). In that case, the Ninth Circuit explained the two steps that the United States Supreme Court developed in Williamson County Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172 (1985) to analyze ripeness for taking claims. Id. at 1402. The Sinaloa court explained that the second step of the ripeness analysis applies only to physical takings and requires the plaintiff to pursue available state court remedies if state law could provide adequate compensation. Id. The court held that, under Williamson, the district court must look to the time of the physical occupation or regulatory taking to determine whether a state remedy existed. If the remedy existed at the time of the taking, then the cause of action is not ripe and should be dismissed to be brought in state court. Id.

In accordance with Sinaloa, this court would

have and has in other cases dismissed these taking claims for lack of ripeness since California has long had an inverse condemnation remedy for physical occupation takings. See Marina Plaza v. California Coastal Zone Conservation Comm., 73 Cal. App. 3d 311, 325 (1977) (listing cases dating back to the 1950's which applied inverse condemnation theory to physical occupation taking cases). In its opposition, however, plaintiff argued that California does not provide an adequate state remedy for its Hall claims due to a very recent case Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990), review denied, 1991 Cal. Lexis 353 (Cal. 1991). In that case, the state appellate court affirmed the trial court's grant of demurrer to the defendant, ruling that Hall type facts do not state a claim for relief. Plaintiff contended that the subsequent denial by the California Supreme Court to review the Yee decision had the same effect as an affirmation. Plaintiff also noted that several other state appellate decisions failed to recognize Hall type claims. See, Casella v. City of Morgan Hill, No. H006972, 91 Daily Journal D.A.R. 5577, 5579 (May 10, 1991) (repudiating Hall's attempt to bootstrap mobile home rent control ordinance to the Supreme Court's "very narrow holding in Loretto"); Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside, 157 Cal. App. 3d 887 (1984) (stating that similar challenges to mobile home rent controls are regulatory challenges). Therefore, according to plaintiff, California offers no remedy for a Hall type claim, making the taking claims now ripe for federal adjudication.

This court believes, however, that the Yee decision does not indicate that plaintiff has no remedy in state court. A denial of review is not equivalent to an affirmation by the state Supreme Court. See, Comment to Advisory Committee to California Rule of Court 28; see also, People v. Davis, 147 Cal. 346, 350 (1905). The California Supreme Court is not bound by its denial of review of the Yee decision and could decide to review another of the many Hall type claims presently pending in the state court system. Other appellate departments, moreover, are not bound by the decision of Department One in the Yee case. Although the Yee, Casella and Oceanside decisions may indicate a general hostility by these courts toward Hall type claims, plaintiff's claims are not futile in the state court system. Indeed, the Ninth Circuit recently reached a similar conclusion in Schnuck v. City of Santa Monica, __ F.2d __, No. 89-55283, slip op. at 6877 (9th Cir. June 4, 1991). That court affirmed a dismissal of a Hall takings claim which challenged an apartment rent control law. The court noted that plaintiff's "allegation of mere generalized hostility of the state courts to takings claims does not excuse her failure to seek relief there. See Sinaloa Lake Owners, 864 F.2d at 1480. She must show that 'state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances.' Austin v. City and County of Honolulu, 840 F.2d 678, 681 (9th Cir. 1988)." Id. at 6883.

Despite the obvious logic that militates dismissal of these takings claims on ripeness grounds, Judge Kozinski has ruled that Yee, et al., indicate that the

state court has established that park owners may not obtain just compensation through inverse condemnation under any circumstances. In Sierra Lakes v. City of Rocklin, __ F.2d __, No. 89-15371, slip op. at 8463 (9th Cir. July 9, 1991), mobile home park owners challenged a vacancy control ordinance as resulting in a physical taking. Reviewing Yee, Oceanside, and Casella, Judge Kozinski found that there was more than a "mere generalized hostility of the state courts to takings claims" and that plaintiff demonstrated an inability to "'obtain just compensation through an inverse condemnation action under any circumstances.' " Id. at 8471 (citing Schnuck, slip op. at 6883). Judge Kozinski then concluded that plaintiff had exhausted its remedies and that its physical taking claim was therefore ripe. Id.

The rule in Sierra is clearly applicable to the case at bar since this case involves a Hall type claim. Thus, contrary to this court's prior rulings and inclination, the present Hall claims in Claims Two and Three cannot be dismissed on ripeness grounds. Nonetheless, these claims are dismissed as barred by the statute of limitations for §1983 claims.

In De Anza Properties X, Ltd., et al. v. County of Santa Cruz, __ F.2d __, No. 89-15750, slip op. at 7983 (9th Cir. June 28, 1991), the Ninth Circuit considered a case where plaintiff challenged a mobile home rent control ordinance, alleging a Hall type taking pursuant to 42 U.S.C. §1983. The court noted that the statute of limitations for all takings claims pursuant to §1983 filed after the U.S. Supreme Court decision in Wilson v. Garcia, 471 U.S. 261 (1985) is either one

year after the decision in Wilson or three years after the date of the taking for takings occurring prior to Wilson. Id. at 7986-87. The court then considered when such a cause of action accrues. Plaintiff argued that its injury does not stem from the enactment of the ordinance but from the sale of the mobile homes, causing a new claim to accrue each time a mobile home is sold. Id. at 7989. The court specifically rejected this reasoning and ruled that such a cause accrues at the time of enactment since in a Hall claim it is the government's ordinance which gives rise to the taking and not the tenant's decision sell. Id. at 7990.

In accordance with De Anza, this court dismisses plaintiff's taking claims in Claims Two and Three as time-barred. Since the Ninth Circuit applied its rule of when such an action accrues and thereby dismissed the taking claim before the Court, the rule must be applied retroactively. In this case, the City added the vacancy control provision to its mobile home rent control ordinance in November, 1985 and reenacted the provision and the ordinance on March 27, 1986. Since Wilson v. Garcia was decided in April, 1985, the one year statute of limitations applies. Whether or not the statute runs from the original enactment in November, 1985 or from the reenactment in March, 1986, plaintiff's claims are time-barred. This action was filed in 1989, which is more than a year beyond 1985 and 1986.

Although the De Anza case seems to put this area of law and this particular case to rest, this court recognizes that other developments in the law may

later affect the litigation of this and similar cases. For one, in a recent California case Kirkpatrick, et al. v. City of Oceanside, et al., 91 Daily Journal D.A.R. 8587 (July 18, 1991), the appellate court recognized that an "as applied" taking claim can be alleged in California courts. In that case, mobile home park owners challenged a rent control ordinance primarily on its face. Rejecting plaintiff's facial challenge, the court noted that plaintiff did allege "some facts which, if proven, would support a determination the government has gone too far and taken their property without just compensation." Id. at 8589. This decision supports defendant's contention that plaintiff has not exhausted state remedies and that Yee does not mean plaintiff's attempts at the state level on an "as applied" claim would be futile.

Although the statute of limitations set by the Ninth Circuit in De Anza will probably knock out many of these cases and Kirkpatrick may indicate that some relief is available in state court, these cases leave several issues open. The ruling in Kirkpatrick does not affect the ripeness of facial takings claims. Thus if Judge Kozinski's decision in Sierra is correct, a plaintiff may be able to bring a facial challenge to these ordinances in federal court but not an "as applied" takings claim since California may offer a remedy for such claims. Further, Judge Kozinski and other like-minded judges may not give Kirkpatrick much credence. If a federal district court granted a motion to dismiss an "as applied claim" on ripeness grounds and plaintiff appealed to the Ninth Circuit, that Court may find that California offers no remedy

for "as applied" takings claims and that, therefore, such claims are ripe as well for federal adjudication.

Finally, it is not clear what effect the De Anza decision would have on "as applied" claims. The claim in De Anza was a facial challenge, alleging a physical taking; whether the statute of limitations for an "as applied" claim brought pursuant to §1983 should also begin to run from the date of enactment of the challenged ordinance has yet to be answered.

B. Substantive Due Process Claims

In Claim One, plaintiff alleges that the Ordinance serves no public purpose because vacancy control enables the tenants to sell their mobile homes at a premium above the actual value. Because future residents must pay this premium, the Ordinance fails to achieve the legitimate public purpose of preserving affordable spaces and thereby violates substantive due process. There seems to be some confusion as to whether plaintiff has made a facial attack on the Ordinance or an attack on the City' conduct in enacting the Ordinance. In response to the earlier motion to dismiss before Judge Taylor, plaintiff asserted that the City's actions were "arbitrary" and "capricious" and supported this with allegations that the city enacted the Ordinance as a result of political pressure and that the Ordinance had no rational nexus with its purpose. In its present opposition, however, plaintiff does not make these allegations but asserts that the complaint alleges that the Ordinance lacks a legitimate government purpose and is not rationally

related to its stated goal. This language and that contained in the complaint seem to allege only a facial attack on the Ordinance. Plaintiff has not reasserted the facts it alleged as to City misconduct, and the complaint does not allege facts to support anything but a facial challenge.

The analysis for alleged violation of substantive due process rights is two part: first, is the purpose of the ordinance legitimate in that it generally is for the good of the public; and, if so, are the means contained in the ordinance reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. Lawton v. Steele, 152 U.S. 133 (1894); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

1. Legitimate government interest

The purpose of the Palm Desert Ordinance is legitimate. The introduction to Ordinance 456 states, in part:

> [T]here is presently within the City of Palm Desert a shortage of spaces for the location of mobile homes commensurate with the demand therefor. This inequitable market situation has resulted in low vacancy rates and contributed to rapidly escalating rents. This situation has resulted in serious concern and hardship among a significant portion of Palm Desert residents living in mobile home parks.
>
> . . . .

> [A]lternative sites for the relocation of mobile homes are difficult to find due to the shortage of vacant spaces, the restrictions on the age, size or style of mobile home permitted in many parks and requirements related to the installation of mobile homes, including the cost of moving a mobile home is substantial and the risk of damage is significant. These facts tend to create a captive market of mobile home park tenants and a great imbalance in the bargaining position of the park owner and the mobile home park tenants in favor of the park owners;
>
> . . . .
>
> [T]he City Council finds and declares it necessary to protect the residents of mobile homes from unconscionable changes in rental rates and unreasonable changes in park rules and regulations while simultaneously recognizing and providing for the needs of park owners to receive a just and reasonable return on their property.

Clearly the concerns of the City in enacting the Ordinance are twofold: one, to protect tenant investment in mobile homes and, two, to control rents in a distorted market where demand far outstripped supply and created a monopoly. A variety of courts have found that similar regulations serve a legitimate interest. For instance, the California Supreme Court upheld a very similar ordinance against a fa-

cial challenge brought on grounds different from this case. In Carson Mobilehome Park Owner's Assn. v. City of Carson, that court stated that the "purpose of the Carson ordinance ... is to counteract the ill effects of 'a shortage of mobilehome spaces which has resulted in a low vacancy rate and rapidly rising space rents.' " (emphasis added). Carson, 35 Cal. 3d 184, 190 (1983).

This court, as well, found a like ordinance to be legitimate in Caliente Sands Ltd. v. City of Cathedral City, No. CV 90-2662-LEW, Slip. Op. filed November 28, 1990. Finally, in Pennell v. San Jose, the Supreme Court rejected reconsideration of the constitutionality of rent control per se. The Court held that the protection of consumer welfare is a legitimate goal and that the primary purpose of rent control is to protect tenants. Pennell, 485 U.S. 1, 12 (1988).

In Hall v. Santa Barbara, the Ninth Circuit speculated in dicta that it thought the ordinance, similar to the one at bar, would probably be found not to "substantially advance a legitimate government interest" on remand. Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988). In footnote 26, the court further postulated that rent control might even be considered unconstitutional per se. The ruling in Pennell, supra, however, clearly rejects such a postulation. Further, Hall is distinguishable from the case at bar on two grounds. First, the ordinance in Hall did not have preservation of tenant investment as one of its avowed purposes. This distinction is crucial because it is on this

basis, primarily, that the substantive due process claim here is dismissed. Second, the standard for the degree of relationship between the ordinance and its purpose is much stricter in the takings context, as in Hall, than in the due process context here. In the takings context, the ordinance must substantially further the legitimate interest. See e.g., Agins v. Tiburon, 447 U.S. 255, 260 (1980). In the due process context, it need only be rationally related. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

2. Rational relationship to the interest

The second prong of the due process test is that the ordinance must be rationally related to the legitimate interest, once that interest is established. The standard for rational relation is extremely deferential. Under this test, a court will find that legislation exceeds the sovereign's police power only if there is no rational relation between an economic enactment and its objective. Ross v. Berkeley, 655 F. Supp. 820, 842 (N.D. Cal. 1987). Moreover, the test for a rational relation is not based on the ultimate effectiveness of the legislation. Rather the test is whether the legislature rationally could have believed at the time of enactment that the legislation would promote its objective. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

Under this standard, the Ordinance at bar is rationally related to a legitimate interest. There is some tension here between the procedural standard governing a motion to dismiss, which is extremely def-

erential to the plaintiff, and the substantive standard for due process which is equally deferential to the defendant in this case. Yet even under the stringent test for a motion to dismiss, under which all the plaintiff's factual allegations are taken as true, the Ordinance is still rational. Essentially, all the Ordinance does is shift the types of payments a tenant must make. Without vacancy control, the monthly rent payment would be high, but the purchase price (and therefore monthly mortgage payments) would be relatively low. Moreover, sales prices and appreciation of the mobile homes would be very low. With vacancy control, the monthly rent payments are kept low, while the purchase price (and monthly mortgage) is high. In this way, the tenants' investments in their mobile homes are protected, while the landlord is guaranteed a reasonable return on his or her investment. Thus, even if the Ordinance does result in a windfall premium to a tenant selling his or her mobile home under Hall, the plaintiff has failed to state a claim for violation of substantive due process under the deferential test discussed above, and the Ordinance is rational.

Finally, the substantive due process claims should be dismissed because plaintiff's injury is compensable. The Ninth Circuit case In Re Aircrash in Bali, 684 F.2d 1301, 1311 (9th Cir. 1982) discussed the interrelation of takings and substantive due process claims. The court held that "[g]enerally, if the loss claimed is compensable, the regulation will not be found unconstitutional (under the due process clause)." In other words, because the plaintiff in this case has access to the state inverse

condemnation remedy, it does not state a cause of action for violation of substantive due process.

The substantive due process claim as written in the complaint constitutes only facial challenges to the Ordinance. As such, it is dismissed without prejudice because the plaintiff might be able to state a claim for violation of due process as applied, if, for example, it alleges that it had applied for an increase under the Ordinance and was not given an amount constituting a fair amount of its investment.

Conclusion

In sum, this Court finds that plaintiff's physical taking claims are barred by the statute of limitations and, therefore must be dismissed. The Court also finds that plaintiff's substantive due process claim is dismissed for failure to state a claim. The Ordinance is rationally related to a legitimate government interest.

For these reasons, defendant's motion to dismiss the complaint is GRANTED. IT IS SO ORDERED.

Dated: 9 Sep 91

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS, SENIOR
UNITED STATES DISTRICT
JUDGE

APPENDIX D

ORDINANCE NO. 456

AN ORDINANCE OF THE CITY OF PALM DESERT, CALIFORNIA, RESCINDING ORDINANCE NO. 329 AND ADDING CHAPTER 9.50 TO THE CODE OF THE CITY OF PALM DESERT RELATING TO MOBILE HOME PARK RENT REVIEW.

WHEREAS, there is presently within the City of Palm Desert a shortage of spaces for the location of mobile homes commensurate with the demand therefor. This inequitable market situation has resulted in low vacancy rates and contributed to rapidly escalating rents. This situation has resulted in serious concern and hardship among a significant portion of Palm Desert residents living in mobile home parks; and

WHEREAS, mobile home owners are property owners with sizable investments in their mobile homes and appurtenances; and

WHEREAS, alternative sites for the relocation of mobile homes are difficult to find due to the shortage of vacant spaces, the restrictions on the age, size or style of mobile home permitted in many parks and requirements related to the installation of mobile homes, including the cost of moving a mobile home is substantial and the risk of damage is significant. These facts tend to create a captive market of mobile home park tenants and a great imbalance in the bar-

gaining position of the park owner and the mobile home park tenants in favor of the park owners; and

WHEREAS, the City Council finds and declares it necessary to protect the residents of mobile homes from unconscionable changes in rental rates and unreasonable changes in park rules and regulations while simultaneously recognizing and providing for the needs of park owners to receive a just and reasonable return on their property; and

WHEREAS, this proposed ordinance has been reviewed and has complied with the requirements of the "City of Palm Desert Procedures to Implement the California Environmental Quality Act, Resolution No. 80-89", in that the Director of Environmental Services has determined that the project will not have a significant adverse impact on the environment and a negative declaration has been prepared.

NOW, THEREFORE, to alleviate the hardship stated above, the City Council of the City of Palm Desert, California, DOES HEREBY ORDAIN as follows:

SECTION 1. That Ordinance No. 329 is hereby rescinded.

SECTION 2. That Chapter 9.50 shall be and the same is hereby added to the Code of the City of Palm Desert, to read as follows:

"Chapter 9.50

MOBILE HOME PARK RENT REVIEW

9.50.010 Title. This ordinance shall be known as the Mobile Home Park Rent Review Ordinance of the City of Palm Desert.

9.50.020 Definitions. The following definitions shall govern the construction of this chapter:

A. 'Management' is the owner of a mobile home park or an agent or representative authorized to act on his behalf in connection with matters relating to a tenancy in the park and also referred to as 'mobile home park owner.'

B. 'Mobile home' for the purpose of this chapter shall be defined by the statutes of the State of California.

C. 'Mobile home park' is an area of land where two or more mobile home sites are rented, or held out for rent, to accommodate mobile homes used for human habitation.

D. 'Park' is a mobile home park.

E. 'Rent' or 'space rent' is the consideration, including any bonus benefit of gratuity demanded or received in connection with the use and occupancy of a mobile home space in a mobile home park.

F. 'Rental agreement' is an agreement be-

tween the management and the tenant establishing the terms and conditions of a tenancy and regulating the amount of a monthly space rental and the allowable increases therein. A lease is a rental agreement.

G. 'Rent schedule' is a statement of the rent charged for each tenancy in a mobile home park, together with any supporting data therefor.

H. 'Services' means those facilities which enhance the use of the mobile home site, including, but not limited to, repairs, replacements, maintenance, water, utilities, security devices, security patrols, storage, bath and laundry facilities and privileges, janitorial services, refuse removal and recreational and other facilities in common areas of the mobile home park. 'Service' does not include charges for interest, depreciation, amortization, financing or refinancing of the mobile home park.

I. 'Tenancy' is the right of a tenant to the use of a site within the mobile home park on which to locate, maintain and occupy the mobile home, site improvements and accessory structures for human habitation, including the use of their services and facilities of the park.

J. 'Tenant' is an owner of a mobile home, responsible for paying rent to management.

K. 'Representative.' In the event that a petition is filed by more than one tenant, they shall designate one (1) of them to be their representative.

L. The 'hearing officer' shall be appointed by the Rent Review Board. The hearing officer shall be knowledgeable in the rules of evidence. The hearing officer shall be impartial and it shall be his duty to conduct an evidentiary hearing pursuant to the provisions of this chapter to obtain evidence from the parties that he deems necessary to make his recommendation and to make recommendations for findings and determinations to the rent review board.

M. 'The rent review board' shall be that board appointed pursuant to Section 4.

N. 'Consumer Price Index' is the index published by the United States Department of Labor, Bureau of Labor Statistics, know as the 'Consumer Price Index for Urban Wage Earners and Clerical Workers for the Los Angeles, Long Beach, Anaheim Area.' (Base Year = 1967). If this index is changed so that the base year differs from the one defined in this chapter, the index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the index is discontinued or revised, such other governmental index or computation with which it is replaced shall be used or such other action as shall be necessary shall be taken in order to obtain substantially the same result as would be obtained if the index had not been discontinued or revised.

O. A 'contested hearing' is a hearing which results from a petition for adjustment which is filed pursuant to the provisions of this chapter.

P. 'Capital improvement costs' are all expenditures which are required to be 'capitalized' rather than 'expensed' for state or federal income tax purposes.

9.50.030 Exemptions. The provisions of this chapter shall not apply to the following tenancies in mobile home parks located in the City:

A. Mobile home park spaces rented out for nonresidential uses.

B. Mobile home parks, the construction of which began after the effective date of the ordinance codified in this chapter; provided, however, that such exemption continues in effect for only two years after the issuance of the building permit for the same, or until the park is seventy-five percent (75%) occupied; for the purposes of this section, 'construction' means the erection of structures.

C. Mobile home parks managed or operated by the United States Government, the State of California, or the City of Palm Desert.

D. Tenancies for which any federal or state law or regulation specifically prohibits rent regulation.

E. Tenancies covered by a rental agreement in existence at the time this chapter becomes effective or entered into at any time thereafter where such agreement has a duration exceeding that of a month-to-month tenancy. This exemption shall apply only

for the duration of the agreement, including any renewal or extension therefore. Upon the expiration of such agreement, rent for such space will be fixed at the amount paid for the last month prior to the expiration. Thereafter rents for such space may only be increased in accordance with the terms of this chapter.

F. Mobile home parks which sell lots for mobile homes, factory-built or manufactured housing, or which provide condominium ownership of such lots, even if one or more homes in the development are rented or leased out.

G. Mobile home parks with twenty (20) or less mobile home spaces.

9.50.040 Rent review board.

A. There is hereby established within the City of Palm Desert a mobile home park rent review board consisting of five members appointed by the City Council and serving at the pleasure of the City Council. A member shall serve a term of four years, at the end of which he/she may be considered for reappointment.

B. Any member who is absent without being excused by the board from three successive regular meetings of the board shall be deemed to have vacated his office.

C. Except as expressly provided herein, the board shall establish the time and place of its meet-

ings. All meetings of the board shall establish the time and place of the meetings. All meetings of the board shall be conducted in accordance with the provisions of the Ralph M. Brown Act.

D. Disclosures — all candidates for appointment to the board shall disclose in a verified statement all present holdings and interests in real property, including interests in corporations, trusts or other entities owning real property within this jurisdiction as defined by California Government Code Section 82035. Such disclosure statement shall be made available to the City Council prior to appointment of members of the board and shall be filed with the City Clerk not less than ten (10) days after appointment. Disclosure of holdings required herein shall be in addition to any other disclosure required by state or local law for holders of public office.

E. The board shall make and adopt its own rules and regulations for conducting its business consistent with this ordinance and laws of the state, subject to the approval of the City Council. Such rules and regulations shall be reduced to writing and shall be on file with the City Clerk at all times. The board shall appoint such officers as may be necessary.

F. The board shall keep a record of its proceedings, which shall be open for inspection by any member of the public.

G. Each member of the board shall be entitled to such compensation as may be set by the City

Council by ordinance to be paid entirely from filing fees paid to the City.

H. The City Manager shall designate an employee who shall serve as the secretary of the board. The City Clerk shall be responsible for the maintenance of all its permanent records.

I. Three members of the board shall constitute a quorum. Three affirmative votes are required for a decision, including all motions, orders and rulings of the board.

9.50.050 Powers of the rent review board.

Within the limitations provided by law, the rent review board shall have the following powers:

A. To meet at such times as may regularly be scheduled by the board, or from time to time at the call of the chairman to herein determine the petitions filed hereunder at the request of the City Manager, or otherwise to conduct the business of the board. All meetings shall be conducted at City Hall in the City of Palm Desert.

B. To appoint and designate hearing officers for the conduct of evidentiary hearings to be conducted hereunder.

C. To receive, investigate, hear and determine petitions of landlords for hardship adjustment of rent pursuant to Section 9.50.060 of the Code of the City of Palm Desert.

D. To make or conduct such independent hearings or investigations as may be appropriate to obtain such information as is necessary to carry out their duties.

E. To authorize an increase in the maximum amount of rent otherwise permitted to be charged by a mobile home park owner pursuant to this ordinance. Such authorizations shall be given where the board finds that the application of the ordinance apart from such authorized increase, results or would result in undue hardship to the mobile home park owner's property. In determining whether a hardship rent increase should be authorized, the board may consider, among other relevant factors, increased cost to the mobile home park owner attributable to increases or decreases in master land and/or facilities lease rent, utility rates, property taxes, insurance, advertising, government assessment and fees, incidental service, normal repair and maintenance, capital improvements, upgrading and addition of amenities or services, net operating income, as well as just and reasonable return on the mobile home park owner's property.

F. To adopt, promulgate, amend or rescind administrative rules to effectuate the purposes and policies of the ordinance, subject to the approval of the City Council.

G. To maintain and keep at City hall, rent review hearing files and dockets listing the time, date and place of hearings, the parties involved, the ad

dress involved and the final disposition of the hearing.

H. To recommend to the City Council the adoption of a fee schedule setting such fees and charges as appear necessary or desirable to defray in whole or in part the costs of administration of the board and conduct of its assigned duties.

I. To recommend to the City Council the imposition of a registration program for implementation of this Section including any registration fees in connection therewith.

9.50.060 Maximum rent.

Except as otherwise provided in this chapter, the maximum rent for each mobile home space that management of a mobile home park shall request, demand or receive shall not exceed three-quarters (3/4ths) of the increase in the cost of living as indicated in the Consumer Price Index. Said increase shall initially be calculated from the monthly space rent charged on April 28, 1983 and shall be determined based upon the latest available Consumer Price index for the twelve (12) month period preceding the date of the rate increase. No mobile home park owner shall be entitled to more than one such rent increase in any twelve (12) month period. No mobile home park owner shall be entitled to such an increase within twelve (12) months of the granting of a hardship increase.

No mobile home park owner shall increase any rent in excess of the above set forth allowable increase, unless and until the mobile home park owner obtains a hardship adjustment granted by the rent review board as provided herein.

9.50.070 Initiation of review and hearing process.

A. A mobile home park owner or any representative of the mobile home park owner, operator or manager of mobile home park space affected by the ordinance, upon payment of such filing fee as shall be duly established, may petition the board for a hardship increase of the maximum rent permitted to be charged pursuant to the ordinance. If the board shall designate a form of the filing of such petition, such petition shall be filed upon such form. If no such form shall be designated, such petition shall be in writing, verified by the applicant and shall contain the name, address and telephone number of the applicant; the name and address of the resident of each mobile home space which would be affected if the petition were granted; a statement of the facts giving rise to the petition for hardship increase, in sufficient detail that if established, such facts would demonstrate the existence of a hardship upon the mobile home park owner warranting such hardship increase; a statement that each resident of a space to be affected by the hardship increase, if granted, has been served a notice of the filing of the petition; such notice shall inform each resident of the location where the petition may be obtained or reviewed.

B. Any resident of a mobile home park or a mobile home park owner, affected by the ordinance, upon payment of such filing fee as shall be duly established, may petition the board for an interpretation of the ordinance, for a determination of whether a particular course of action, either proposed or actual, is legal, valid and within the terms of the ordinance. If the board shall establish forms for such petitions, the petition shall be prepared and submitted upon such form. In the absence thereof, the petition shall contain the name, address and telephone number of the person requesting the interpretation or opinion, the name, address and telephone number of the mobile home park owner, manager or other person authorized to represent the mobile home park owner, and the name, address and telephone number of any other residents of mobile home space of individuals requesting such determination; a brief statement of the facts giving rise to the request for interpretation or determination.

C. In the event that a petition is filed, the petitioner shall serve a notice of the filing of same. If said petition is by management, service shall be on each tenant within the mobile home park in a form provided by the City; if said petition is by a tenant of tenants, service of a notice of the filing of the same shall be on management.

D. Within twenty (20) days after the filing of the proof of service of the notice under the preceding sections, the opposing party may file opposition.

E. The hearing officer shall establish a date for hearing, giving notice to all parties thereof and shall promptly consider and decide all petitions filed pursuant to this chapter. The matter shall be considered and decided in the order filed. The party filing any petition shall deposit with the City of Palm Desert the estimated cost as estimated by the City Manager to the City of all costs to the City, including without limitation the cost of the meeting of the rent review board, the full cost of conducting the hearings as herein provided, the cost of the hearing officer, and the cost of preparation of any record. In the event the funds so deposited exceed the City's costs, any excess shall be refunded to the parties so depositing the same and any deficiency must be agreed to be paid by such party. Additional deposits may be required to cover costs when it is determined that the initial deposit is not sufficient to satisfy the same. In the event such deposits, when required, are not made in a timely manner, the petition shall be deemed withdrawn and the proceeding terminated. The hearing officer shall consider all relevant facts presented at the hearing and may require additional information to be presented by the manager or others to determine what adjustments, if any, should be made.

F. For any contested hearing, if there is more than one party on a side, the hearing officer may require the parties on one side to designate a representative to receive service of notice, papers and documents with respect to the same, and after such desig

nation, the service on the representative so designated shall be deemed to be giving service to all such parties on that side.

G. In the event of any contested hearing, each tenant in the affected mobile home park, (or the tenants' representative if one has been designated), shall be mailed a notice of the time and place of the commencement of the hearing and the possible effect upon his or her rent. Said mobile home park tenants shall be given a chance and an opportunity to be heard at the contested hearing. No further notice shall be required to be given under this chapter for any continuances of the hearing.

H. All meeting and hearings shall be open to the public and notice thereof given as required by law. Meetings shall be held as necessary to hear and decide petitioners.

I. The City Manager shall notify the petitioning party upon receipt of opposition to the petition and as soon as possible thereafter shall notify both parties of the time, date and place of hearing.

J. Upon receipt of a valid petition pursuant to this chapter, the rent review board, unless it conducts the hearing itself under the provisions of this section, shall refer to the opposition and the petition to a hearing officer who shall conduct an evidentiary hearing upon the petition. At the evidentiary hearing, the hearing officer shall take all evidence and may require any party to the proceedings to provide him with pertinent books, records, papers, etc. In

furtherance of this power, the hearing officer may request the City Council to issue a subpoena for the same if they are not voluntarily produced, or he may take a refusal to produce the same as evidence, that such evidence, if produced, would be adverse to the party refusing to produce the same.

K. The management may substitute for any books, records, and papers, a certified audit by an independent certified public accountant using generally accepted accounting principles consistently applied for a verified statement under oath by an independent certified public accountant of what the information sought from such books, records and papers consist of. Notwithstanding this Paragraph 'K', the hearing officer may require production of the books records and papers.

L. The hearing officer shall rule upon the admissibility of all evidence at the evidentiary hearing and shall have the power and authority to conduct the evidentiary hearing in all respects.

M. The hearing officer shall keep detailed notes of the evidence produced and provide for recording of all of the testimony presented at the evidentiary hearing.

N. The evidence presented at the evidentiary hearing shall constitute the exclusive record for the decision of the issues involved.

O. At the conclusion of the evidentiary hearing, the hearing officer shall prepare a summary of

all testimony and evidence admitted at the evidentiary hearing, a statement of all materials officially noticed and prepare proposed findings fact and a recommended decision to the rent review board and shall promptly submit the same to the rent review board, along with copies of all documentary evidence received. Copies of the hearing officer's summary, matters officially noticed and proposed findings and recommendation for decision shall be mailed to all parties participating in the hearing. The hearing officer's proposed findings and recommended decision shall become the final findings and decision of the rent review board within the fifteen days after the filing of the same with the clerk of the rent review board (i.e., the City Clerk) without further action of the board unless and party participating in the hearing shall file a petition to review the hearing officer's proposed findings and determination with the clerk of the rent review board.

P. Upon receipt of the hearing officer's summary, proposed findings, official noticed material and recommendations, and the documentary evidence admitted in the proceedings and a petition to review filed pursuant to paragraph 'O' of this section, the rent review board shall hear arguments by the parties based upon the material submitted to it by its hearing officer. Any party at a proceeding may also have prepared, at his expense, a transcript of the hearing to be presented to the rent review board. No further evidence shall be permitted nor allowed at the hearing before the rent review board, but it shall be based solely upon the materials presented to the hearing officer at the evidentiary hearing.

Q. 1. At the conclusion of the hearing on the proposed findings and recommended decision of its hearing officer before the rent review board pursuant to Paragraph 'P' of this section, the board shall act within thirty (30) days after the date of the hearing;

a. Accept and confirm the recommendations of the hearing officer and adopt his findings and recommendations; or

b. Amend the finds and recommendations of the hearing officer; or

c. Send the matter back to the hearing officer for further hearings on the issue pursuant to any instructions provided by the rent review board.

2. Upon the issuing the findings of fact, pursuant to Subparagraphs 1(a) or 1(b) of this Paragraph 'Q', the rent review board shall render its final decision. The final decision shall be final and conclusive upon all parties. The final decision by the board may include a provision equalizing the rents among all of the tenants of the mobile home park based upon the location size, and improvements supplied by manage-

ment of each mobile home site, notwithstanding any previous disparity between rents charged on equivalent mobile home sites. Any tenant whose rents will be so equalized upwards shall be given special notice of the same and chance to be heard.

R. Any order of the rent review board shall, unless otherwise specified in its final decision, be effective as of the date thirty (30) days after the filing of the petition for adjustment.

S. Any party to a hearing may be assisted by attorneys of the party's choice.

T. No member of the rent review board may participate in the hearing or decision concerning a mobile home park in which he resides or has a financial or management interest.

U. The rent review board shall keep minutes of its meetings and make an official record of a hearing.

V. Decisions of a rent review board shall be supported by a preponderance of the evidence.

W. The evidentiary hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence may be admitted if it is in the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of

any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

X. The rent review board may in its final decision direct the prevailing parties' cost in these proceedings, including any funds paid to the City pursuant to the provisions of this section, shall be reimbursed by the losing party. Such an order for costs may be enforced by a court of law of appropriate jurisdiction. In the event that the rent review board determines that any petition or opposition is frivolous, it may award reasonable attorneys' fees to the other party or parties.

Y. The rent review board or its hearing officer may spread any retroactive rent adjustment under Paragraph 'R' of this section over several months of future rent.

9.50.080 Agreements. Nothing in this chapter shall operate to restrict the right of a tenant and management to enter into agreements providing for a fixed rent and/or a fixed rent for mobile home tenancies.

9.50.085 Vacancy Increase. When a mobile home space becomes vacant on the ownership of a mobile home is changed or transferred the park owner may not raise the monthly rent and such rent shall be at the rate previously approved and set by the Board for the space occupied. A home owner who has entered into an agreement which violates the terms of this subject has the right to rescind the rental provisions

of such agreement to bring the rent into compliance. Such right of rescission shall exist for twelve (12) months from the date of the agreement and is thereafter waived.

9.50.090 Enforceability. In the event of a violation by the management of a mobile home park of any maximum rents, an effective rent schedule, or a final decision and order of the rent review board relief for such a violation shall be enforceable by the individual tenants of that park in a court of the appropriate jurisdiction in which injunctive relief may be granted and damages shall be allowed for any rent paid in excess of the effective rent schedule or any final determination of the rent review boards. In any such court proceeding, the prevailing party shall be awarded his reasonable attorney's fees and the court, where applicable, shall be empowered to order treble damages for any rents charged in excess of any effective rent schedule, maximum rent, or in violation of the final decision of the board (i.e., three times any excessive rent or overcharge).

9.050.100 Limitation of action to attack a final decision – Order of the rent review board

Any action or proceeding to attack, review, set aside, annul or void a final decision and order of the rent review board, or reasonableness, legality or validity of any provision or condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of the summons is effected within ninety (90) days of the filing with the City Clerk of the final determina-

tion and order and notice of the same has been given to the City Clerk.

Any request to the rent review board for reconsideration of any decision made by the board must be made:

1. Within 30 days of the rendition of the decision; and

2. Only upon one or more of the following grounds:

(a) there is newly-discovered evidence which the requesting party was reasonably unable to present at the hearing; or,

(b) there was fraud or other impropriety material to the outcome of the board's decision committed by either party; or,

(c) there was fraud or other impropriety material to the outcome of the board's decision committed by a member of the board or the hearing officer.

3. Said 30-day limit may be waived upon showing proper circumstances.

9.050.110 Negative declaration.

A negative declaration of environmental impact is hereby approved.

9.50.120 Retaliation.

No mobile home park owner shall in any way retaliate against any resident for the resident's assertion of, or exercise of any right under this ordinance. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees. Such retaliation shall also be an available defense in an unlawful detainer action.

In any action in which such retaliation is an issue, the burden shall be on the mobile home park owner to prove that the dominant motive for the act alleged to be in retaliation was in fact other than retaliatory.

9.50.130 Termination of service.

No mobile home park owner shall reduce or eliminate any service to any mobile home space so long as this ordinance is in effect, unless and until a proportionate share of the cost savings resulting from such reduction or elimination is passed on to the resident in the form of a decrease in space rent. If a mobile home park owner who provides services to a mobile home space in the nature of utility services, shall reduce or eliminate such service by separate metering or other lawful means or transferring from the mobile home park owner to the resident the obligation for payment for such services, the cost savings, if any, resulting from such reductions or elimination to be passed on to the resident in the form of a decrease of rent, shall be deemed to be the cost of such transferred utility service for the month of April, 1983. If for any reason the utility bill for such

service for the month of April, 1983, is not representative of the normal or usual cost of such utility service at the time, or is either mobile home park owner or resident shall protest the use of the April, 1983 billing as the measure of such cost savings, then the computation of such cost savings shall be based upon the average monthly charge for such service for the period of March, 1982, through April, 1983, inclusive, or such other period as the parties shall mutually agree is representative of such cost savings.

For the purposes of this section in determining cost savings to be passed on to the resident in the form of decreased rent, the cost in installation of separate utility meters, or similar or analogous costs to the mobile home park owner to shift the obligation for payment of utility costs to the resident, shall not be considered. Nothing stated herein shall be construed to prohibit or prevent the consideration or inclusion of such costs, together with other operational costs of a mobile home park owner, in any proceedings before a duly appointed board, commission or other appointed body, authorized to hear and determine requests for hardship adjustments."

SECTION 2. The City Clerk shall certify to the passage and adoption of this ordinance and shall cause the same to be published once in a newspaper of general circulation printed, published and circulated within the City of Palm Desert and the same shall be in full force and effect thirty (30) days after its adoption.

PASS, APPROVED and ADOPTED this 27th day of March, 1986, by the following vote:

AYES:	BENSON, SNYDER, WILSON, KELLY
NOES:	NONE
ABSENT:	JACKSON
ABSTAIN:	NONE

/s/ Richard S. Kelly
RICHARD S. KELLY, MAYOR
City of Palm Desert, California

ATTEST:

/s/ Sheila R. Gilligan
SHEILA R. GILLIGAN, City Clerk
City of Palm Desert, California

FILED
DEC 2 1 1993

No. 93-870

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

LEVALD, INC., a Wisconsin Corporation, Trustee of Indian Springs Trust,
Petitioner,
v.
CITY OF PALM DESERT, a California Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD R. LINCOLN
(Counsel of Record)
LINDA B. REICH
ENDEMAN, LINCOLN, TUREK & HEATER
600 B Street, Suite 2400
San Diego, California 92101
(619) 544-0123

DAVID J. ERWIN
City Attorney
MICHAEL J. ANDELSON
MARSHALL S. RUDOLPH
BEST, BEST & KRIEGER
39700 Bob Hope Drive #312
Rancho Mirage, California 92270
(619) 568-2611

Attorneys for Respondent City of Palm Desert

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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QUESTIONS PRESENTED

1. Was the Ninth Circuit correct in affirming the dismissal of a federal suit on statute of limitations grounds where the park owner had filed facial taking challenges to a mobilehome park space rent review ordinance more than one year after its enactment?

2. Was the Ninth Circuit correct in concluding that the statute of limitations for a facial regulatory taking challenge to a mobilehome park space rent review ordinance begins to run when the ordinance is enacted?

LIST OF PARTIES

The parties to the proceeding below were Petitioner Levald, Inc., a Wisconsin Corporation, Trustee of the Indian Springs Trust, a Wisconsin Trust Corporation, owner of the Indian Springs Mobilehome Park ("Levald"), and Respondent City of Palm Desert, a California Municipal Corporation ("City").

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No. 93-870

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

LEVALD, INC., a Wisconsin Corporation, Trustee of Indian Springs Trust,
Petitioner,
v.
CITY OF PALM DESERT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Palm Desert ("City") respectfully requests that this Court deny Levald, Inc.'s ("Levald") Petition for Writ of Certiorari ("Petition") seeking review of the United States Court of Appeals for the Ninth Circuit's ("Ninth Circuit") opinion in this case.

OPINIONS BELOW

On September 9, 1991, the United States District Court for the Central District of California issued its unpublished Order granting City's Motion to Dismiss and dismissing Levald's action. See, Petition at C1-20. On July 8, 1993, the Ninth Circuit issued its opinion affirming in part and reversing and remanding in part the District Court ruling. See, *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993); see also, Petition at A1-31.

On September 3, 1993, the Ninth Circuit issued an unpublished Order denying Levald's Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc. See, Petition at B1-2.

JURISDICTION

The Ninth Circuit decision was filed July 8, 1993. On or about July 22, 1993, Levald filed a Petition for Rehearing. On September 3, 1993, the Ninth Circuit denied the Petition for Rehearing. Levald's Petition for Certiorari was docketed with the United States Supreme Court on December 2, 1993. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. Civil Code, Section 798.55(a), contains legislative justification for the unique protections provided mobilehome owners. Protections include restrictions on terminating a space tenancy (e.g., Civil Code, Sections 798.55(b) and 798.56) and restrictions preventing a park owner from interfering with or preventing a homeowner from selling his home to a new purchaser as long as the prospective homeowner has the financial ability to pay the space rent and does not have a prior history indicating that he or she will not comply with the rules and regulations of the park. (E.g., Civil Code, Section 798.74).

California Code of Civil Procedure, Section 340(3) provides that the statute of limitations for personal injuries "caused by the wrongful act or neglect of another" is one year.

Palm Desert Ordinance No. 456 provides for mobilehome park rent review. It permits a park owner to automatically increase park space rent by 75% of the CPI increase and to apply for a "hardship" increase (Section 9.50.060) to ensure that park owners "receive a just and reasonable return on their property." Ordinance, Preamble.

STATEMENT OF THE CASE[1]

A. Background.

The City of Palm Desert ("City") has a population of approximately 23,000 and is located about 10 miles from Palm Springs in

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[1]In the course of Levald's Statement of the Case (Petition at 4-8) and later in Argument (Petition at 17-22), Levald makes certain "allegations" that are neither in the record below nor based on facts that are judicially noticeable under Fed. R. Evid., Rule 201(b). Examples of such allegations include, "Today, land values in the park's vicinity are 10 times values in 1983" (Petition at 5); "The rent Levald now receives is a fraction of the current fair market rent for spaces in the park" (Petition at 6); A recent rent increase "pushed Levald's rent return ever increas-

Riverside County in the State of California. The City has four mobilehome parks with a total of 692 spaces. The Indian Springs Mobilehome Park is owned and operated by Levald, Inc. ("Levald") and has 191 spaces.

On June 23, 1983, the City enacted Ordinance 329 (codified as Chapter 9.50 of the Palm Desert Municipal Code) which established mobilehome park rent review. On November 14, 1985, the City enacted as an urgency ordinance ("because of the abuses occurring and which will continue to occur") Ordinance 442, which added a provision preventing a park owner from increasing the rent whenever a mobilehome space becomes vacant or the ownership of a mobilehome is transferred.[2]

On March 27, 1986, the City replaced its prior rent review ordinances with Ordinance 456 ("Ordinance"). See, Ordinance, Petition at D1-25.[3] It permits a park owner to automatically

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ingly lower than current market values" (Petition at 6n.5); "In 1986, at Ordinance enactment, disparity between actual rent and fair market rent was nonexistent or slight. Controlled rent in 1986 was not substantially different from fair market rent for Levald's mobile home park spaces" (Petition at 17). There are also inconsistencies in these statements. For example, *compare*, "Only two sales took place in 1986, and no sales in 1987" (Petition at 17) and "Only *two* sales took place between Ordinance adoption and 1988" (Petition at 19); *with* "In the first year after Ordinance enactment only 7 park mobilehomes sold" (Levald's Ninth Circuit Opening Brief at 28). Under the circumstances, it is respectfully submitted that these allegations be stricken or disregarded. See, 998 F.2d at 684n.1, Petition at A8n.1 (Ninth Circuit granted Motion to Strike similar allegations in Levald's Ninth Circuit briefs).

[2]Although some courts have used the term "vacancy control" to describe this type of provision, it is a misnomer. Since mobilehomes are almost always sold "in place," there is rarely a space "vacancy."

[3]The Preamble to the Ordinance (Petition at D1-2) sets forth some of the reasons for its enactment including "low vacancy rates" and "rapidly escalating rents." After recognizing that mobilehome owners "are property owners with sizeable investments in their mobilehomes and appurtenances," and that there is a "a captive market" and a "great imbalance in the bargaining position of the park owner and the mobilepark tenants in favor of the park owners" the City Council found the Ordinance was

increase his space rent annually by 75% of the CPI increase and also obtain a hardship adjustment to further increase rents if necessary to assure a just and reasonable return. Ordinance, Section 9.50.060, Petition at D11-12. It also provides for continued rent regulation whenever ownership of a mobilehome is changed or transferred. Ordinance, Section 9.50.085, Petition at D20.[4]

B. Procedural History.

On August 23, 1989, prior to seeking any hardship rent increase from the Rent Board to make up for its inability to automatically raise rents whenever a mobilehome was sold,[5] Levald filed a Complaint in federal court. *Indian Springs Trust, a Wisconsin Trust Corporation v. City of Palm Desert*, C.D.Cal., No. SA 89-580 JSL (RWRx).[6] The Complaint consisted of three claims.[7] Claim one alleged that the Ordinance violated substantive due process because it did not advance a legitimate governmental

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necessary. It is designed "to protect the residents of mobilehomes from unconscionable changes in rental rates . . . while simultaneously recognizing and providing for the needs of park owners to receive a just and reasonable return on their property." Petition at D2.

[4]The language of Ordinance, Section 9.50.085 is virtually unchanged from that in Ordinance 442, *supra*.

[5]Levald is well aware of the hardship rent provisions. In 1985 the park obtained a hardship rent increase of $22.05 per space per month. Not satisfied with that amount, it obtained a state court writ directing the Rent Board to increase the hardship increase to take into account certain operating expenses. See, *Indian Springs Ltd. v. Palm Desert Rent Review Board*, 193 Cal.App.3d 127, 238 Cal.Rptr. 112 (1987).

[6]On February 21, 1990 the Complaint was amended to state the complete name of the plaintiff as "Levald, Inc., a Wisconsin Corporation, Trustee of Indian Springs Trust." On March 8, 1991 when the case was transferred to Los Angeles and reassigned to Judge Waters, it was renumbered No. CV-91-1180 LEW (TX).

[7]Federal jurisdiction for these claims was based upon 28 U.S.C. Sections 1331, 1332 and 1343. The Complaint also asked the District Court to assert pendent jurisdiction over state claims for inverse condemnation and declaratory relief.

purpose.[8] Claim two alleged that the Ordinance resulted in a taking (inverse condemnation) by the City.[9] Claim three sought declaratory relief that the Ordinance was an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19, of the California Constitution. Levald sought damages of $3,820,000, declaratory and other relief.

On October 25, 1989, after its initial motion to dismiss was denied,[10] City filed its answer denying the major allegations of the Complaint and raising various affirmative defenses.

On December 17, 1990, the City's Motion for Summary Adjudication of Issues and Judgment on the Pleadings was granted in part and denied in part.[11] On January 25, 1991, the

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[8]In language very similar to that used by the plaintiff in *Yee* (see, *Yee v. City of Escondido*, 503 U.S._____112 S.Ct. 1522, 118 L.Ed.2d 153, 165 (1992)), Levald contended that a combination of the state Mobilehome Residency Law (Civil Code, Section 798 et seq.) and the Ordinance transferred a possessory interest from the park owner to the residents in the form of an alleged "premium on the sale of a mobilehome." It therefore contended that the Ordinance did not accomplish its "goal" of preventing unreasonable rental rates.

[9]Levald alleged that a taking occurred because under the Ordinance the park owner cannot automatically raise rents to capture the alleged "premium."

[10]On November 7, 1989, the District Court denied City's Motion to Dismiss for lack of ripeness, on statute of limitations grounds, and for failure to state a claim.

[11]The Court determined that the "vacancy control enactment" became effective on or about November 1, 1985 (based on the enactment of Ordinance 442); denied City's request for a one year statute of limitation, ruling Levald's *state* claims may be brought within (5) years of the alleged taking; found diversity jurisdiction did not exist; denied the Motion for Judgment on the Pleadings; and held that the State of California was not an indispensable party.

City's Second Motion for Judgment on the Pleadings and Summary Adjudication also was granted in part and denied in part.[12]

Finally, on September 9, 1991, the Court granted City's Motion to Dismiss the Complaint. See Order, Petition at C1-20. The Court held that Levald's federal facial taking claims were barred by the statute of limitations (Order, Petition at C7-14) and that the substantive due process facial claim failed to state a claim. Order, Petition at C14-20.[13]

On October 9, 1991, Levald filed its Notice of Appeal.

On July 8, 1993, the Ninth Circuit issued its decision affirming in part and reversing and remanding in part. *Levald, Inc. v. City of Palm Desert, supra,* 998 F.2d 680, Petition at A1-32. Initially, the Court held Levald's physical taking claim was foreclosed by this Court's decision in *Yee v. City of Escondido, supra.* See, 998 F.2d at 685, Petition at A9-10.

After permitting Levald to raise "for the first time on appeal" a regulatory taking claim (998 F.2d at 685, Petition at A10-12) and finding that such a facial claim was "ripe" (998 F.2d at 686, Petition at A12-14), the Court held that it was nevertheless barred by the statute of limitations. 998 F.2d at 686-89, Petition at A14-20. In so doing, it held that such a facial claim accrued upon the enactment of the City's Ordinance in 1986 and since

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[12]The Court denied the request for dismissal of the state inverse condemnation claim without prejudice; granted City's request to dismiss the substantive due process facial challenge as being untimely; denied without prejudice City's request to dismiss the substantive due process challenges; denied without prejudice City's request to limit damages to one year prior to the filing of the lawsuit; and granted City's request to bar future damages.

[13]The dismissal of the substantive due process claim was without prejudice. The Court indicated that Levald might be able to state a claim for an "as-applied" due process claim. See, Order, Petition at C20. On or about September 30, 1991, Levald lodged a request seeking an extension of time to file an Amended Complaint, purportedly to state a revised substantive due process claim. On October 8, 1991, the District Court denied the request to file the Amended Complaint.

Levald had not filed suit until 1989, the one year statute of limitations for Section 1983 claims had run. 998 F.2d at 688, Petition at A18. The Court held that the same rule also applied to bar the declaratory relief claim. 998 F.2d at 688-89, Petition at A20.

Next, the Court considered Levald's argument that it nevertheless had stated an "as-applied regulatory taking claim." 998 F.2d at 689-90, Petition at A20-24. After pointing out that such a claim had not been stated in Levald's Complaint (998 F.2d at 689, Petition at A21), the Court, assuming "arguendo" that such a claim had been stated, nevertheless concluded that it should be dismissed because it was "unripe" since (1) such a claim was cognizable in the state courts and (2) Levald had not sought compensation in the state courts prior to bringing this federal claim. 998 F.2d at 689-90, Petition at A22-23.

The Court then considered Levald's substantive due process claim and held that its dismissal was proper because the Ordinance met the "rational relationship" test. 998 F.2d at 690, Petition at A24-26.[14]

The Court, however, did reverse and remand the District Court's denial of Levald's request to amend its Complaint to state a claim for violation of due process "as-applied" (see note 12, *supra*) because the District Court had given no justifying reason for that dismissal. 998 F.2d at 691-92, Petition at A26-30.

On September 3, 1993, the Ninth Circuit denied Levald's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. See Order, Petition at B1-2.

WHY THIS WRIT SHOULD BE DENIED

This case fails to meet this Court's criteria for review because:

(1) the Ninth Circuit's decision is not a final judgment disposing of the entire case;

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[14] The Court also affirmed the District Court's decision to decline to exercise supplemental jurisdiction over any pendent state law claims. 998 F.2d at 692, Petition at A30.

(2) the Ninth Circuit's decision is consistent with this Court's prior rulings (Supreme Court Rule 10(c)); and

(3) there has been no showing that the Ninth Circuit's decision conflicts with those of other Circuits, or otherwise warrants review. Supreme Court Rule 10(a).

I

THE NINTH CIRCUIT'S DECISION IS NOT A FINAL JUDGMENT DISPOSING OF THE ENTIRE CASE.

This Court should not issue a Writ of Certiorari to review a Judgment of a Circuit Court of Appeals that is not final "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384, 13 S.Ct. 758, 37 L.Ed. 486 (1893).

As this court stated in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed. 629 (1916), the granting of a Petition for Certiorari should

> be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions. . . . And, except in extraordinary cases, the writ is not issued until final decree.

This Court has refused to grant a Petition for Certiorari solely on the grounds that a judgment below is not final. See, e.g., *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967) (Court denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court"). See also, *Virginia Military Institute v. United States*, ____ U.S. ____, 113 S.Ct. 2431, 124 L.Ed.2d 651-52 (1993) (Scalia J., concurring, stating, "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); see generally, R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th Ed. 1993) Sec. 4.18, p. 196.

On July 8, 1993 the Ninth Circuit issued its decision in *Levald, Inc. v. City of Palm Desert, supra.* In its Petition Levald inaccurately states that the "Ninth Circuit *affirmed* the District Court's dismissal." Petition at 8. In actuality, the Ninth Circuit "AFFIRMED in part, REVERSED and REMANDED in part." See, 998 F.2d at 692, Petition at A31. As discussed *supra*, a portion of this case was reversed and remanded because the lower court failed to state its reasons for denying Levald's motion for leave to amend its substantive due process claim to allege a violation of due process "as-applied."

This Court in its discretion should deny Levald's Petition for Writ of Certiorari because the Judgment in this case is not final since the case has been remanded to the lower court. This case does not present a case of extraordinary circumstances warranting review by this Court prior to a final judgment. A grant of certiorari at this time could result in piecemeal litigation.

II

THE NINTH CIRCUIT CORRECTLY DISMISSED LEVALD'S FACIAL REGULATORY TAKING CLAIM ON STATUTE OF LIMITATIONS GROUNDS

A. There Is A Difference Between Facial And As-Applied Regulatory Taking Claims.

In *Yee v. City of Escondido, supra*, this Court considered similar challenges to the Escondido Mobilehome Rent Protection Ordinance. Initially, this Court held there was no "physical" taking. 118 L.Ed.2d at 168.[15]

After refusing to decide the substantive due process claim because it had not been raised below (118 L.Ed.2d at 168-69), this Court discussed Yee's regulatory taking challenge. In so doing, it carefully distinguished between "facial" and "as-applied" regulatory taking claims. It indicated that an "as-applied"

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[15]In reaching this conclusion this Court indicated its disapproval of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

regulatory taking claim would be "unripe" because Yee had not sought rent increases,[16] but ruled that a "facial" regulatory taking claim would be "ripe" because such a claim does not depend upon the extent to which petitioners were deprived of the economic use of their particular pieces of property or the extent to which they are compensated. 118 L.Ed.2d at 169.[17]

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[16]This Court cited *Williamson County Regional Planning Comm' v. Hamilton Bank*, 473 U.S. 172, 186-97, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). *Yee, supra*, 118 L.Ed.2d at 169.

[17]As pointed out *supra* at 7, the Ninth Circuit reached a similar conclusion as to the "ripeness" of Levald's facial regulatory claim. See, 998 F.2d at 686; Petition at A12-14. Applying *Williamson County, supra*, and *Yee, supra*, the Ninth Circuit held that the requirement of seeking a final decision regarding the application of the regulation to the property at issue does not apply to a facial challenge. 998 F.2d at 986; Petition at A12-13. It similarly held that *Williamson County's* second hurdle, the requirement that plaintiffs exhaust available state court remedies was also inapplicable. The Ninth Circuit explained that at the time the alleged taking occurred (i.e., at the enactment of the Ordinance in 1986), California did not recognize damages actions for inverse condemnation based on regulatory takings, and therefore since it would have been futile to seek state court relief, the claim was ripe in the federal courts. 998 F.2d at 686; Petition at A13-14.

Under the circumstances, Levald's position that its "facial" cause of action did not accrue until 1988, while designed to avoid the one year statute of limitations applicable to section 1983 claims, could be a Pyrrhic victory. Assuming arguendo Levald's action accrued in 1988, that was after this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and at a time when the California state courts did recognize damage actions for inverse condemnation based on regulatory takings. Under the circumstances, if Levald is correct as to the accrual date (which it is not), its suit would therefore be dismissed on lack of ripeness grounds. See, e.g., *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 506 (9th Cir. 1990), *cert. denied*, _____ U.S. _____, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991) (Ninth Circuit upheld dismissal of facial challenge that ordinance effected a "taking" because "appellants have not sought compensation through state procedures.") Either way, it is clear the federal courts were correct in dismissing Levald's facial regulatory taking claim.

After pointing out that it was "unclear" if a "regulatory taking" had been raised below, this Court explained that the question of whether a "taking" was "physical" or "regulatory" did not involve separate "claims" but rather separate "arguments" in support of a single "taking" claim. Since Yee had clearly raised a "taking" claim below he could therefore "argue" it was a "regulatory taking." *Id.* at 170. This Court nevertheless dismissed Yee's facial regulatory taking claim because it had not been "fairly included" in "the question petitioners raised seeking certiorari." *Id.* at 172.[18]

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 295-297, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), this Court also distinguished between "facial" and "as-applied" taking claims. In reviewing the "facial" claim, it phrased the question as "whether the 'mere enactment' of the Surface Mining Act constitutes a taking." 452 U.S. at 295. After finding that the Act did not on its face "den[y] the owner economically viable use of his land," this Court concluded that the "mere enactment" of the Act was not a "taking." *Id.* at 296-97. This Court held that any "as-applied" challenges were not "ripe" because the property owners had not exhausted available administrative remedies. *Id.* at 297. See also, *Hodel v. Indiana*, 452 U.S. 314, 335-36, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) (Court held that the "mere enactment" of statute did not on its face deprive owner of

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[18]This Court concluded this discussion by stating, "We leave the regulatory taking issue for the California courts to address in the first instance." 118 L.Ed.2d at 172.

Subsequently, in *Sandpiper Mobile Village v. City of Carpinteria*, 10 Cal.App.4th 542, 12 Cal.Rptr.2d 623 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1850, 123 L.Ed.2d 473 (1993), the state court did "address" similar regulatory taking claims brought by another park owner. The Court held that the facial regulatory taking claim failed because the mobilehome park rent review ordinance neither deprived the park owner of all economic use of its property nor failed to substantially advance legitimate state interests. *Sandpiper*, *supra*, 10 Cal.App.4th at 549-51. The Court also dismissed the parkowner's "as-applied" regulatory taking claims on lack of "ripeness" grounds "[b]ecause Sandpiper has not alleged that it has attempted to change the use of its park or to apply for rent increases." *Id.* at 549.

beneficial use of his property and dismissed as premature other "as-applied" challenges); *Pennell v. San Jose*, 485 U.S. 1, 10, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) (Court held that "on its face" the Ordinance did not require a rent reduction due to tenant hardship and refused to consider "as-applied" challenges where the situation had not yet occurred); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 494, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (Court recognized distinction between claim that mere enactment of statute constitutes a taking and claim that particular impact of governmental action is a taking).[19]

Levald's reliance (Petition at 12) upon *Norco Construction Inc. v. Kings County*, 801 F.2d 1143 (9th Cir. 1986), is misplaced. There the developer was not making a facial challenge to an ordinance, but instead was seeking damages for a county's failure to approve its preliminary plat application. Under the circumstances, the Court held that its cause of action (for a temporary taking) did not accrue until the County finally decided to approve its application. See, 801 F.2d at 1146.

Similarly, Levald's reliance on two California cases, *Britt v. Superior Court*, 20 Cal.3d 844, 143 Cal.Rptr. 695 (1978), and *Smart v. City of Los Angeles*, 112 Cal.App.3d 232, 169 Cal.Rptr. 174 (1980) (Petition at 13 n.12), is also misplaced. Neither case involved facial challenges to a statute or ordinance. Instead, both involved alleged takings due to noise from overflying aircraft.[20]

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[19]*Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798, 813 n.6 (1992), is not to the contrary. It merely restates the test to be applied in facial taking challenges — "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.' "

[20]*Bacon v. United States*, 295 F.2d 936 (Ct. Cl. 1961); *Jensen v. United States*, 305 F.2d 444 (Ct. Cl. 1962); *Aaron v. United States*, 311 F.2d 798 (Ct. Cl. 1963); and *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 218 Cal.Rptr. 293 (1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986) (see, Petition at 22 n.18 and 24 n.19), were all "airport noise" cases and also did not involve facial challenges to ordinances. *Capogeannis v. Superior Court*, 12 Cal.App.4th 668, 15 Cal.Rptr.2d 796 (1993), was similar in

In any event, Levald concedes (Petition at 12) that when a federal claim accrues is a question of federal not state law. See, e.g., *National Advertising Co.v. City of Raleigh*, 947 F.2d 1159, 1162 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992).

Here, Levald could potentially state two types of regulatory taking challenges: a "facial" challenge and an "as-applied" challenge. In its Petition Levald attempts to meld the two. Although Levald refers to "an ordinance subject to facial challenge" ("Questions Presented," Petition at i), it then proceeds to argue what is basically an "as-applied" claim, that is, that the subsequent enforcement of the ordinance created the cause of action. Petition at 18. Almost by definition, a "facial" claim arises at the "enactment" of the ordinance. An "as-applied" claim results from its "application" to particular circumstances and property. See, *Hodel, supra,* 452 U.S. at 297.

B. Every Circuit Court Which Has Considered The Issue Has Held That Facial Regulatory Taking Claims Accrue On The Enactment Of The Ordinance.

In *De Anza Properties X Ltd. v. County of Santa Cruz,* 936 F.2d 1084 (9th Cir. 1991), the Ninth Circuit reviewed a virtually identical challenge to Santa Cruz County's mobilehome space rent control ordinance. There the ordinance had been enacted in 1982 and suit was not filed until January 1987. The Court stated:

> It is undisputed that if appellant's cause of action accrued when the ordinance was enacted in 1982, then the appellant's claim is time-barred.
>
> 936 F.2d at 1085.

The Court then discussed De Anza's various attempts to circumvent that bar. Initially, it pointed out that although the ordinance had been modified in August 1987, the provision challenged had remained the same since 1982 and therefore its reenactment had not changed its impact on De Anza. 936 F.2d at 1086. It then discussed De Anza's alternate contention that "a

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that it involves a suit for damages caused by contamination from a fuel tank leakage and also did not involve a facial challenge to an ordinance.

new cause of action accrues each time one of the appellant's tenants sells a mobilehome to a new tenant and appellants are precluded from raising rent." 936 F.2d at 1087. The Court pointed out that this approach was inconsistent with the theory set forth in *Hall & City of Santa Barbara, supra*, that it was the "Ordinance" that had transferred a possessory interest in the park owner's land to the tenants and that the "taking" did not depend upon the existence of a sale. *Ibid.*

Here, the same reasoning applies. In its Complaint, Levald contended that it was a combination of the state Mobilehome Residency Law "and the Ordinance [which] transfer[red] a possessory interest from the mobilehome park owner to the mobilehome tenant." Complaint at 8. Even though it now contends that only 14 sales took place prior to 1989 when it filed suit (see, Petition at 17-18), Levald's Complaint sought damages of "$3,820,000 ($20,000 x 191 [the] number of mobilehomes at the Subject Property) for the value of the possessory interests taken. . . ." See, Complaint at 12. Therefore, it is apparent that the allegations in Levald's Complaint did not depend upon whether or not a particular mobilehome had sold or not, but instead sought damages for a park-wide "taking" based on the enactment of the Ordinance.

In *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), the Ninth Circuit again considered the application of the statute of limitations in the context of a similar challenge to a mobilehome space rent review ordinance. After holding that Azul's physical taking challenge was ripe (948 F.2d at 579) and valid under *Hall, supra* (948 F.2d at 581-82), it nevertheless held that under *De Anza, supra,* the limitations period for a facial taking claim begins to run on the date the challenged ordinance is enacted (948 F.2d at 586), and since "vacancy control" was enacted in May 1982, Azul's claims filed pursuant to 42 U.S.C. Section 1983 in April 1987 were barred. *Ibid.* However, after pointing out that Azul had also stated claims directly under the Constitution, the Court held that those Constitutional claims were not governed by the same statute of limitations applied to Section 1983 claims. Instead, it concluded that a five or six year statute applied, and therefore found the claims to be timely. 948

F.2d at 587. In addition, the Ninth Circuit remanded the case to the District Court because it had miscalculated damages holding that in determining damages for a "physical" taking, a taking occurred "when the Los Angeles vacancy control *ordinance was passed, not at the time of the sale of the coaches*" (emphasis added). 948 F.2d at 584-86.

Following this Court's decision in *Yee v. City of Escondido, supra,* the Ninth Circuit granted rehearing, withdrew its opinion at 948 F.2d 575, and issued a new opinion dismissing the action. *Azul Pacifico Inc. v. City of Los Angeles,* 973 F.2d 704 (9th Cir. 1992), *cert. denied,* ____ U.S. ____, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). After first concluding that a litigant complaining of a constitutional right *must* sue pursuant to 42 U.S.C. Section 1983 (see, 973 F.2d at 705), the Court stated:

> The cause of action accrued when the ordinance at issue here was enacted. *De Anza Properties X, Ltd. v. Santa Cruz County,* 936 F.2d 1084, 1085 (9th Cir. 1991). Azul should have filed its complaint within three years of the May 1982 date of enactment or within one year of the Supreme Court's decision in *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). See, *Usher v. Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987) The limitations period under those alternatives expired in May 1985. Azul did not file its complaint until April 1987.
>
> *Ibid.*

Circuit Judge Kozinski (who had authored both *Hall* and the original *Azul* decision), while agreeing that the Petition for Rehearing must be granted (*Ibid.*), dissented from the dismissal arguing that *De Anza* had been implicitly overruled by *Yee* and *Lucas. Ibid.* Contrary to Levald's implication (Petition at 14), the action of the majority in dismissing *Azul* clearly indicated their disagreement with Judge Kozinski's position.[21]

In *National Advertising Co. v. City of Raleigh, supra,* 947 F.2d 1158, the Fourth Circuit reached a similar conclusion and also

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[21]In the instant case it is clear that the Ninth Circuit also followed *De Anza* and were not convinced by Judge Koziwski's dissent in *Azul.*

dismissed a facial taking claim on statute of limitation grounds. In 1983, Raleigh had adopted an ordinance restricting off-premise outdoor advertising signs. In 1989, National sued in federal court claiming the ordinance was a taking. The District Court dismissed, finding the Section 1983 action was barred by the applicable state statute of limitations. On appeal, National contended that on the date the ordinance passed, it had not suffered injury, and no cause of action accrued until a 5½ year grace period for nonconforming signs expired, at which time its signs would have to comply with the ordinance.

The Fourth Circuit disagreed, holding

> National's cause of action arose when the ordinance was enacted because it was then, if at all, that National suffered the regulatory interference with the primary uses of its property.
>
> 947 F.2d at 1163.

In response to National's argument that no challenge to the ordinance was possible before April 1989 (after the 5½ year grace period), the Court stated, "National's contentions miss the mark. Immediately upon enactment, the 1983 ordinance interfered in a clear, concrete fashion with the property's primary uses" (*Ibid*) because "the present value of the nonconforming signs were reduced accordingly." 947 F.2d at 1163-64.

Levald's contention that it could not have suffered any injury until the 1988 sales (Petition at 17-20) is similarly erroneous. It was the enactment of the ordinance not the subsequent sales of the mobilehomes which "took" from Levald any "right" it had to increase rents at the time a mobilehome was transferred.[22]

Levald attempts to avoid this obvious fact by arguing that its injury was "continuous." In *National Advertising Co. v. City of*

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[22]Levald's attempt to calculate both its loss and its damages based on the sales of mobilehomes also violates the fundamental rule that in determining taking damages the question is "What has the owner lost?" not "What has the taker gained?" See, *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910).

Raleigh, supra, the Fourth Circuit in response to a similar argument that the ordinance before it created a "continuing" constitutional violation, held:

> as has been observed many times "a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." [Citation]
>
> 947 F.2d at 1166.

The Court continued:

> Here, any taking occurred at the time of the ordinance's enactment; what continued was the ill effect of the ordinance's enactment and the alleged taking. No continuing unlawful acts have been shown.
>
> *Ibid.*

See also, *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (Acknowledging the existence of the "continuing wrong" doctrine but rejecting it under the facts in that case because the "continuing wrong violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation").

Levald's reliance (Petition at 20) on *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), for the proposition that its injury was "continuous" is misplaced. In *Dickinson*, property owners sued in 1943 under the Tucker Act to recover the value of their property which they claimed had been taken without compensation when the Government dammed a river and raised the water level by successive stages until it permanently flooded part of their land. The Government alleged that the land owner's claim was barred by the six year statute of limitations which began to run when the dam began to impound water in October 1936 or no later than May 1937 when the dam was capable of operation and the land owner was partially submerged for the first time. 331 U.S. at 747. In holding that the statute of limitations did not bar the land owner's claims, this Court stated that

> . . . when the Government chooses not to condemn land but to bring about a taking by a *continuing process of physical*

> *events* the owner is not required to resort to piecemeal or premature litigation . . .
>
> 331 U.S. at 749 (emphasis added).

In contrast to *Dickinson*, the instant case does not involve a physical occupation of the park owner's land. Rather, if there has been an interference with its "property," it occurred upon enactment of the Ordinance. Levald has not alleged any continuing unlawful acts other than the enactment of the Ordinance. Failure to receive increased space rent upon the sale of a mobilehome is merely an "effect" of the Ordinance, not a continuing wrong by the City. See, *National Advertising Co. v. City of Raleigh*, *supra*, rejecting the "continuing wrong" doctrine when the only "wrong" is the enactment of an ordinance.

Since at least November 1985 City has had an ordinance in effect which restricted Levald's ability to raise rent whenever a mobilehome was sold or transferred. It is undisputed that Levald was aware of this provision at or near the time of its enactment.[23] Levald's belated claim (after *Yee*) that he suffered no injury until there were a substantial number of sales of mobilehomes is not only inconsistent with his Complaint (discussed *supra*), but also with the general rule that the statute of limitation begins to run when a plaintiff "knows or has reason to know of the injury which forms the basis for the action." See, e.g., *Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987) (Court dismissed facial attack on City Ordinance which required neighbors consent for drilling activity, ruling that since Oil Com-

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[23]See, e.g., an August 20, 1985 letter from Mr. Goldstein, Levald's primary agent, to City addressing the "vacancy control" issue. CR 24, Ex. "D".

Levald's argument that the application of the statute of limitations to bar its claims would violate due process (Petition at 25-26) adds nothing. Unlike the situation in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), where this Court ruled that publication was inadequate notice of probate proceedings to a known or "reasonably ascertainable" creditor, here there is no question that Levald was aware of and knew of the enactment of the Ordinance and that it would effect his right to increase rent at the time a mobilehome was transferred.

pany had knowledge of Ordinance its failure to file suit until five years later barred the suit).

Levald's claim that the Ordinance's restrictions on raising rents when mobilehomes were sold "took" his property is far from unique. At least as early as 1984 identical arguments had been made in the state courts. See, *Oceanside Mobilehome Park Owners Ass'n. v. City of Oceanside*, 157 Cal.App.3d 887, 906-07, 204 Cal.Rptr. 239 (Court dismissed argument as "flawed".) Yet even after *Hall, supra,* had been decided by the Ninth Circuit in 1986, Levald waited until 1989 to file similar claims. This delay was clearly improper. See also, *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (Court rejected plaintiff's contention that statute of limitations on suit against City officials for false arrest did not commence running until this Court's decision in *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) finding that allowing such a delayed accrual could "result in an outpouring of stale, difficult to defend claims, contrary to the policy underlying limitation statutes").

C. Under The Circumstances, Levald's Facial Regulatory Taking Claim Is Barred Because It Was Not Filed Within One Year Of The Enactment Of The Ordinance.

In *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), this Court determined that the applicable statute of limitations for all claims brought under 42 U.S.C. Section 1983 is the state statute applicable to a tort action for the recovery of damages for personal injuries. See also, *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (If state has more than one statute of limitations, Section 1983 claim is governed by the residual or general personal injury statute of limitations).

Levald concedes (Petition at 16), that "[i]n California, the limitation period for personal injury is one year; pursuant to California Code of Civil Procedure Section 340(3)." See, e.g., *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (Section 1983 claims arising after *Wilson v. Garcia, supra*, apply California's one year statute of limitations for personal injury torts); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1456 (9th Cir.

1985), *cert. denied*, 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987) (Statute of limitations applicable to Section 1983 inverse condemnation claims is the one year limitation set forth in California Code of Civil Procedure, Section 340(3)).

Here, the provision of the Ordinance challenged (Section 9.50.085) has been in constant application since the enactment of Ordinance 442 in November 1985 (see Petition at C2) and has been a part of the current Ordinance (Ordinance 456, Petition at D20-21) since March 1986. See, Petition at C2. Pursuant to this Court's rulings (e.g., *Wilson v. Garcia*, *supra*) any claim brought under 42 U.S.C. Section 1983 making a facial attack on the Ordinance had to be brought within one year. Therefore, any "facial" challenge to Section 9.50.085 of the Ordinance had to be filed at least by March 1987 and probably by November 1986. Here, Levald admits (Petition at 6) that it did not file its Complaint until August 23, 1989, more than three years after the enactment of Ordinance 456. Under the circumstances, Levald's "facial" taking claim is clearly barred.

III

THE NINTH CIRCUIT ALSO CORRECTLY DISMISSED LEVALD'S DECLARATORY RELIEF CLAIM ON STATUTE OF LIMITATIONS GROUNDS

Although not raised in its "Questions Presented" (see, Petition at i),[24] Levald also argues that the statute of limitations is inapplicable to its declaratory relief claim (Petition at 24). Levald's argument is without merit.

In *Cope v. Anderson*, 331 U.S. 461, 463-464, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947), this Court held that where a party has concurrent equitable and legal claims, a Court in equity will not grant relief when the statute of limitations would bar the concurrent legal remedy.

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[24]Pursuant to *Yee v. City of Escondido*, *supra*, 118 L.Ed.2d at 171-72, Supreme Court Rule 14.1(a) provides that issues not raised in the "Questions Presented" will normally not be considered.

Similarly, in *Russell v. Todd*, 309 U.S. 280, 289, 60 S.Ct. 527, 84 L.Ed. 754 (1940), this Court held that:

> Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations.[25]

Citing *Cope* and *Russell,* the First Circuit held in a similar takings case:

> To prevent plaintiffs from making a mockery of the statute of limitations by the simple expedient of creative labelling — styling an action as one for declaratory relief rather than for damages — courts must necessarily focus upon the substance of an asserted claim as opposed to its form. It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy.

Gilbert v. City of Cambridge, 932 F.2d 51, 57 (1st Cir. 1991), *cert. denied,* ____ U.S. ____, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991).

Other Circuits agree:

> If a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern.

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[25]Levald's reliance (Petition at 25 n.21) upon *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946), is misplaced. There, unlike the instant case, the case concerned "not only a federally-created right but a federal right for which the sole remedy is equity." See, 327 U.S. at 395. It was in that special circumstance that this Court refused to apply a state statute of limitations. *Castner v. First National Bank of Anchorage*, 278 F.2d 376, 385 (9th Cir. 1960), is similar. There the Ninth Circuit ruled in an appeal from the Alaska Territorial Court that an action seeking an accounting and a receiver was within the "exclusive providence of a court of equity" and therefore the governing limitations was laches not statute of limitations.

Orangetown v. Gorsuch, 718 F.2d 29, 42 (2nd Cir. 1983), *cert. denied,* 465 U.S. 1099, 104 S.Ct. 1592, 80 L.Ed.2d 124 (1984). See also, *Swan v. Board of Higher Education,* 319 F.2d 56, 59-60 (2nd Cir. 1963) (Section 1983 action seeking declaratory relief barred by statute of limitations).

Under the circumstances, the statute of limitations barring its facial regulatory taking claim also bars Levald's claim for declaratory relief based on the same facts.

IV

APPLICATION OF THE STATUTE OF LIMITATIONS TO BAR THIS ACTION IS APPROPRIATE

Levald's contention that "if an ordinance is unconstitutional, the statute of limitations is no bar to suit" (Petition at 23-25) approaches tautological dimensions. If an ordinance is in fact unconstitutional, then of course there must be a way to challenge it. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d. 510 (1965). However, the issue presented here is not whether Levald is forever prevented from showing that the Ordinance is unconstitutional, but instead whether this facial challenge is barred. The barring of this facial challenge will not prevent Levald from raising a proper "as-applied" challenge — e.g., if it can show that the application of the Ordinance prevents it from obtaining a fair return on its investment.

In its Petition, Levald has characterized its claim as one for a "facial regulatory taking", but argues that this "facial" claim did not accrue when the Ordinance was enacted but only later when *it* decided *it* was first "damaged." Petition at 20. If this Court were to allow such a self-determined delayed accrual theory — statutes of limitation would become meaningless. In fact, this Court has recognized the efficacy of statutes of limitations, even in civil rights cases.[26] See, e.g., *O'Sullivan v. Felix*, 233 U.S. 318, 34

[26]Today, even the United States is subject to having its claims for money damages barred by applicable statutes of limitation. See, e.g., 28 U.S.C. Section 2415 (limitation period for money damage claims), also

S.Ct. 596, 58 L.Ed. 980 (1914) (This Court applied Louisiana's one year statute of limitations to bar civil rights suit); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462-63, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (This Court held 42 U.S.C. Section 1981 claims barred by Tennessee's one year statute of limitations). See also, *Runyon v. McCrary*, 427 U.S. 160, 180-182, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (While holding that 42 U.S.C. Section 1981 prohibited private schools from excluding Blacks, this Court refused to award damages finding them barred by applicable statute of limitations).

In *Wilson v. Garcia, supra*, 471 U.S. at 271, this Court stated:

> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.[27]

This Court then further explained that

> [t]he borrowing of statutes of limitations for Section 1983 claims serves those policies of repose . . . [and] incorporates the State's judgment on the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action.
>
> *Ibid.*

This Court continued by recalling that Section 1983 provides "a uniquely federal remedy against incursions under the claimed

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28 U.S.C. Section 2409a(q) (limitation period for quiet title actions involving lands in which United States claims an interest); 28 U.S.C. Section 1658 (limitations for actions arising under Acts of Congress).

[27] Almost from the beginning of our Country's history, statutes of limitations have been applied to stabilize property interests. See, e.g., *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78, 8 L.Ed. 195 (1831) ("the best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles").

authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 271-72.

Levald has made no demonstration why its action should have any special immunity from the statutes of limitations applied to other Section 1983 claims.

CONCLUSION

After its "physical taking" claim became untenable after this Court's *Yee* decision, Levald attempted to argue "for the first time on appeal" (see, 998 F.2d at 685, Petition at A10-11) that the Ordinance effected a "facial regulatory taking". The Ninth Circuit carefully considered Levald's arguments and correctly held that the facial regulatory taking claim was barred by applicable statutes of limitations. Under the circumstances, this Court should deny Levald's Petition because it is clear that the Ninth Circuit's decision was in accord with the Court's prior rulings, was not in conflict with those of other Circuits and otherwise fails to warrant review by this Court.[28]

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DONALD R. LINCOLN
(Counsel of Record)
LINDA B. REICH
ENDEMAN, LINCOLN, TUREK & HEATER
600 B Street, Suite 2400
San Diego, California 92101
(619) 544-0123

DAVID J. ERWIN
City Attorney
MICHAEL J. ANDELSON
MARSHALL S. RUDOLPH
BEST, BEST & KRIEGER
39700 Bob Hope Drive #312
Rancho Mirage, California 92270
(619) 568-2611

Attorneys for Respondent
City of Palm Desert

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[28]See, e.g. *supra* at 10-12, (pointing out that contrary to Levald's implication the case is not final but instead has been remanded to the District Court); *supra*, at 11-12, n.16 (pointing out that if Levald avoids the statute of limitations, his case is subject to dismissal for lack of "ripeness" for failure to exhaust state court remedies); *supra* at 12 n.17 (pointing out that in any event when viewed on the merits Levald's facial regulatory taking claim fails to state a claim).

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

LEVALD, INC., a Wisconsin Corporation, Trustee of Indian Springs Trust,

Petitioner,

vs.

CITY OF PALM DESERT, a California Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JERROLD A. FADEM
KEITH W. DOUGLAS
ANDREW H. KOPKIN
Counsel of Record
FADEM & DOUGLAS
A Professional Corporation
12424 Wilshire Boulevard, Suite 900
Post Office Box 250050
Los Angeles, California 90025
(310) 207-2727

Attorneys for Petitioner

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INTRODUCTION

Petitioner Levald, Inc., a Wisconsin Corporation, Trustee of the Indian Springs Trust (Levald) replies, pursuant to Supreme Court Rule 15.6, to respondent City of Palm Desert, a California Corporation's (City) Opposition (Opposition) to Levald's Petition for Writ of Certiorari (Petition) in which the City resists the Petition by arguing that the judgment in the case at bench lacks finality.

The City's argument fails as the judgment is final.

The Ninth Circuit affirmed the United States District Court for the Central District of California's (District Court) decision. (Petition, P 1, 2, and App A) The Ninth Circuit remanded to the District Court for the District Court to, in the City's own words, "state [the District Court's] . . . reasons" for denying leave to amend Levald's Complaint.[1]

The Ninth Circuit later denied Levald's Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc. (Petition, P 1, 2, and App B)

The judgment in the case at bench is final. The City's claim that "[a] grant of certiorari at this time could result in piecemeal litigation" (Opposition, P 10) is specious.

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[1] The City concedes that "a portion of this case was reversed and remanded because the lower court failed to state its reasons for denying Levald's motion for leave to amend its substantive due process claim . . . ." (Opposition, P 10)

THE JUDGMENT IS FINAL

The judgment is final. Here, unlike the cases on which the City relies in its Opposition, the District Court has power only to **explain** the District Court's denial of leave to amend. [2]

The City relies on *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.* (1967) 389 US 327 and *Virginia Military Institute v. United States* (1993) __US __, 113 S Ct 2431, 124 L Ed 2d 651, 651-652 for the proposition that "[t]his Court has refused to grant a Petition for Certiorari solely on the grounds that a judgment below is not final." (Opposition, P 9)

However, neither *Aroostook* nor *Virginia Military* are apposite to the case at bench, because in both *Aroostook* and *Virginia Military* remand required the lower court to reconsider a portion of the decision and thereby modify or alter the judgment for which certiorari had been sought.

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2 Levald's appeal "confer[red] jurisdiction on the court of appeals and divest[ed] the district court of its control over those aspects of the case involved in the appeal." (*Griggs v. Provident Consumer Discount Co.* [1982] 459 US 56, 58)

Thus, in *Aroostook:*

> "The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, and also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.' " (389 US at 328)

In *Virginia Military:*

> "The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy." (124 L Ed 2d at 651)

Here, unlike *Aroostook* and *Virginia Military*, the Ninth Circuit affirmed the entire judgment of the District Court. (Petition, App A) The remand to the District Court was solely for an **explanation**:

> "Since the district court did not provide an explanation for its refusal to allow Levald to amend its complaint and since its reasons are not apparent from the record, we conclude that the district

> court abused its discretion in failing to explain its reasons for denying leave to amend the complaint. **We thus remand for explanation**." (Petition, App A, P 30; emphasis added.)

The Ninth Circuit did not direct that the District Court do anything other than explain the District Court's denial of leave to amend.

As the judgment is final, there is no danger here of "piecemeal litigation."

The City strategically deletes the words (bolded below) from its quotation to *American Construction Co. v. Jacksonville T & K.W. Ry. Co.* (1893) 148 US 372, 384:

> "[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal **from an interlocutory order,** unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." (148 US at 384)

As there is no "interlocutory order" at issue here, the City's reliance on *American Construction* is unavailing. [3]

The Ninth Circuit's decision here is a "final decree."

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[3] The City's reliance on *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.* (1916) 240 US 251, 258 is also unavailing, as in *Hamilton Brown* there was no final decree.

CONCLUSION

The judgment in the case at bench is final.

This Court's guidance is needed. Levald prays that certiorari be granted or the matter be remanded to the Ninth Circuit for reconsideration under the precedents in Levald's Petition.

Respectfully submitted,

FADEM & DOUGLAS
A Professional Corporation

JERROLD A. FADEM
KEITH W. DOUGLAS
ANDREW H. KOPKIN
Counsel of Record

Attorneys for Petitioner
Levald, Inc.